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No. 91-1128-CFX
Status: GRANTED

Docketed:
January 13, 1992

Vide:
91-1111

Title: Merrett Underwriting Agency Management Limited, et al., Petitioners
v.
California, et al.

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Boast,Molly S., Ostrager,Barry R.

Counsel for respondent: Greene,Thomas, Sampson,George, Weber,George K., Tiegel,Lisa R., Darling,Donald L., Cohen,Jerry S., Saveri,Guido, Rubin,Warren, Haerle,Paul R., Kaplan,Lewis A., Creskoff,Howard J., Foster,David L., Sagarin,J. Daniel, Axinn,Stephen M., Chimicles,Nicholas E., Bannigan,Eugene, Berch,Rebecca, Klafter,Jeffrey A., Shapiro,Stephen M., Lewis,James R.

Entry	Date	Note	Proceedings and Orders
1	Jan 13 1992	G	Petition for writ of certiorari filed.
2	Jan 31 1992		Brief of respondent Terra Nova Insurance Co. Limited in opposition filed.
3	Feb 12 1992		Brief amicus curiae of Government of the United Kingdom of Great Britain filed.
13	Feb 12 1992	G	Motion of Brokers & Reinsurance Markets Association for leave to file a brief as amicus curiae in No. 91-1111 filed.
5	Feb 14 1992		Brief of respondents California, et al. in opposition filed. VIDED.
4	Feb 19 1992		DISTRIBUTED. March 6, 1992
6	Feb 25 1992	X	Reply brief of petitioners Merrett Underwriting, et al. filed.
7	Mar 4 1992		REDISTRIBUTED. March 20, 1992
9	Mar 23 1992	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
10	Aug 7 1992		Brief amicus curiae of United States filed. VIDED.
11	Aug 12 1992		REDISTRIBUTED. September 28, 1992
12	Aug 27 1992	X	Supplemental brief of petitioners filed.
14	Oct 5 1992		Motion of Brokers & Reinsurance Markets Association for leave to file a brief as amicus curiae in No. 91-1111 GRANTED.
15	Oct 5 1992		Petition GRANTED.
			***
22	Nov 2 1992		The time allotted for oral argument in these cases is expanded to a total of ninety minutes.
16	Nov 19 1992		Brief of petitioners Merrett Underwriting, et al. filed. VIDED.
17	Nov 19 1992		Joint appendix filed. VIDED.
18	Nov 19 1992		Brief of petitioners in 91-1111, Hartford Fire Insurance Co., et al. filed. VIDED.
19	Nov 19 1992		Brief amici curiae of Government of the United Kingdom of Great Britain, et al. filed. VIDED.
20	Nov 19 1992		Brief amici curiae of National Association of Casualty &

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No. 91-1128-CFX

Entry	Date	Note	Proceedings and Orders
			Surety Agent, et al. filed. VIDED.
21	Nov 19 1992		Brief amicus curiae of Government of Canada filed. VIDED.
23	Nov 19 1992		Brief of petitioner Sturge Reinsurance Syndicate Management Limited filed. VIDED.
24	Dec 3 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
26	Dec 4 1992	G	Motion of petitioners for divided argument filed.
25	Dec 7 1992		LODGING by petitioners (91-1128) 12 copies of Lloyd's Act 1982 and Self Regulation at Lloyd's: Report of the Fisher Working Party, May 1980.
28	Dec 14 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
29	Dec 14 1992		Motion of petitioners for divided argument GRANTED. to be divided as follows: 30 minutes for petitioners in No. 91-1111 and 15 minutes for petitioners in No. 91-1128.
30	Dec 23 1992		Brief amici curiae of Delaware, et al. (19 States) filed. VIDED.
31	Dec 23 1992		Brief of respondent Private Party Plaintiffs, Ace Check Cashing, Inc., et al. filed. VIDED.
33	Dec 23 1992		Brief amici curiae of Service Industry Council, et al. filed. VIDED.
34	Dec 23 1992		Brief amicus curiae of Service Station Dealers of America filed. VIDED.
35	Dec 23 1992		Brief of respondent States in 91-1128 filed. VIDED.
36	Dec 23 1992		Brief amicus curiae of United States filed. VIDED.
37	Dec 23 1992		Brief amici curiae of National League of Cities, et al. filed. VIDED.
32	Dec 28 1992		SET FOR ARGUMENT TUESDAY, FEBRUARY 23,1993.(3RD CASE).
38	Jan 7 1993		CIRCULATED.
40	Jan 22 1993	X	Reply brief of petitioner Sturge Reinsurance Syndicate Management Limited in 91-1128 filed.
39	Jan 25 1993	X	Reply brief of petitioners in No. 91-1111 filed. VIDED.
41	Feb 4 1993		Record filed.
		*	Original proceedings U.S. Court of Appeals, Ninth Circuit and U.S.District Court,N.Dist.California (4 Boxes)
42	Feb 23 1993		ARGUED.

(1)

91-1128

No. 91-

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, THREE QUAYS UNDERWRITING MANAGEMENT LIMITED, JANSON GREEN MANAGEMENT LIMITED, MURRAY LAWRENCE & PARTNERS, D.P. MANN UNDERWRITING AGENCY LIMITED, ROBIN A.G. JACKSON, PETER N. MILLER, EDWARDS & PAYNE (UNDERWRITING AGENCIES) LIMITED, and STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(For Further Appearances See Reverse Side of Cover)

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QUESTION PRESENTED

Did the court of appeals properly assess the extraterritorial reach of the U.S. antitrust laws in light of this Court's teachings and contemporary understanding of international law when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?

PARTIES TO THE PROCEEDING

. This case involves complaints by nineteen states and numerous private plaintiffs that were consolidated for pretrial purposes by the Judicial Panel on Multi-District Litigation in MDL Docket No. 767.

Plaintiffs in the consolidated proceeding, who were also appellants in the Court of Appeals for the Ninth Circuit, were:

States: The States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, Ohio, Pennsylvania, Washington, West Virginia, and Wisconsin.

State or Local Government Entities, Listed by State:

Alabama: City of Mobile; City of Birmingham

California: City of Lafayette; City and County of San Francisco; County of San Benito

Louisiana: City of Baton Rouge; City of New Orleans; City of Slidell; City of Nachitoches; City of Eunice

Massachusetts: Town of Hanover; Town of Milford

Montana: County of Teton

New York: Roosevelt Island Operating Authority, Inc., Village of Croton; Village of Lake Success

Ohio: Township of Jackson; County of Hardin

Pennsylvania: County of Schuylkill; City of Altoona; City of York; Borough of Chambersburg

Washington: County of Cowlitz

West Virginia: City of Clay: County of Hancock; County of Mineral; County of Wirt

Private Plaintiffs: Big D Building Supply Corp.; Anastasios Markos, T/A Municipal Exxon; Bay Harbor Park Homeowners Ass'n, Inc.; Environmental Aviation Sciences, Inc.; Carlisle Day Care Center, Inc.; Bensalem Township Authority; Keyboard Communications, Inc.; Glabman Paramount Furniture Mfg. Co., Inc.; Les-Ray Bobcat, Inc.; Jerry Grant Chemical Associates, Inc.; Durawood, Inc.; Carmella M. "Boots" Liberto Trading as R.J. Liberto, Inc.; Henry L. Rosenfeld; Acme Corrugated Box Co., Inc.; P&J Casting Corp.; Ace Check Cashing, Inc.

Defendants in the consolidated proceeding, who were also appellees in the Ninth Circuit, were, beside petitioners, the following:

Allstate Insurance Company; Aetna Casualty & Surety Company; CIGNA Corporation; General Reinsurance Corporation; Hartford Fire Insurance Company; Insurance Company of North America; Insurance Services Office, Inc.; Reinsurance Association of America; Thomas A. Greene & Company, Inc.; Ballantyne, McKean & Sullivan Limited; C.J.W. (Underwriting Agencies) Limited (sued herein as C.J. Warrilow-Hine & Butcher, Ltd.); Lambert Brothers (Underwriting Agencies) Limited (sued herein as J. Brian Hose & Others, Ltd.); R.K. Carvill & Co., Ltd; Continental Reinsurance Corporation (U.K.) Limited; Unionamerica Insurance Company, Ltd.; CNA Re (U.K.), Ltd.; Kemper Reinsurance London, Ltd.; Constitution Reinsurance Corporation; Mercantile & General Reinsurance Company of America; Prudential Reinsurance Company; North America Reinsurance Company; Winterthur Swiss Insurance Company; Excess Insurance Company, Ltd.; Excess Insurance Group, Ltd.; Terra Nova Insurance Company Limited.

STATEMENT PURSUANT TO RULE 29.1

Merrett Underwriting Agency Management Limited is wholly owned by Merrett Holdings PLC.

Three Quays Underwriting Management Limited is wholly owned by Cater Allen Holdings PLC.

Edwards & Payne (Underwriting Agencies) Limited and Sturge Reinsurance Syndicate Management Limited, successor in interest to Oxford Syndicate Management Ltd., are wholly owned by Sturge Group PLC.

None of the other petitioners has any parent or subsidiary corporations within the meaning of Rule 29.1 of the Rules of the Supreme Court of the United States.

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No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, THREE QUAYS UNDERWRITING MANAGEMENT LIMITED, JANSON GREEN MANAGEMENT LIMITED, MURRAY LAWRENCE & PARTNERS, D.P. MANN UNDERWRITING AGENCY LIMITED, ROBIN A.G. JACKSON, PETER N. MILLER, EDWARDS & PAYNE (UNDERWRITING AGENCIES) LIMITED, and STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Merrett Underwriting Agency Management Limited, Three Quays Underwriting Management Limited, Janson Green Management Limited, Murray Lawrence & Partners, D.P. Mann Underwriting Agency Limited, Robin A.G. Jackson, Peter N. Miller, Edwards & Payne (Underwriting Agencies) Limited, and Sturge Reinsurance Syndicate Management Limited respectfully petition for a writ of certiorari to review the judgment and opinion issued by the court below.

OPINIONS BELOW

The opinion of the court of appeals is reported at 938 F.2d 919 (9th Cir. 1991). A-1-31.[1] The opinion of the district court is reported at 723 F. Supp. 464 (N.D. Cal. 1989). A-32-83.

JURISDICTION

The opinion of the court of appeals was entered on June 18, 1991. Petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc*, which the court of appeals denied on October 15, 1991. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition involves Sections 1 and 7 of the Sherman Act, 15 U.S.C. §§ 1 and 6a, respectively. Section 1 of the Sherman Act was enacted July 2, 1890. Section 7 of the Sherman Act was enacted October 8, 1982, as part of the Foreign Trade Antitrust Improvements Act. The full texts of these provisions are reproduced in the Appendix at A-93.

STATEMENT

This petition raises the question whether a United States district court may, at the behest of American plaintiffs, apply U.S. economic regulatory law to foreign actors participating in a foreign market governed by the laws and traditions of a foreign sovereign. The district court here (William W. Schwarzer, J.) concluded that it should not hear claims brought under the American antitrust laws against foreign actors under such circumstances, because to do so would cause a substantial conflict with the laws and policies of another nation — the United Kingdom — that outweighed the factors urged by plaintiffs in support of jurisdiction. The Court of Appeals for the Ninth Circuit acknowledged that substantial conflict with British law and policy would result from application of American law to the

[1] Numbers following the letter "A" denote reference to the Appendix to this petition.

claims at issue. Nonetheless, in an opinion by John T. Noonan, Jr., J., the court of appeals reversed the district court, in a holding that left the acknowledged conflict with foreign law essentially irrelevant to the issue whether jurisdiction under the U.S. antitrust laws should be exercised to reach the foreign conduct alleged.

This Court has never addressed the question whether and to what extent the extraterritorial reach of this nation's economic regulatory laws is restrained by considerations of international law and comity. The Court's teachings in related areas, however, strongly demonstrate that those concerns should play a vital role and that the interests of foreign nations deserve far greater respect than they received from the Ninth Circuit in this case. In the absence of guidance from this Court, conflict and confusion have developed among the circuit and district courts and commentators.

Because the Ninth Circuit was also the birthplace of the *Timberlane* line of decisions, which represented the most enlightened application of principles of international law to questions of jurisdiction under U.S. economic legislation, that court's retreat from its former, internationally-oriented stance is likely to carry special weight with other courts, and could serve to increase the confusion among the courts below. This case presents this Court with a prime opportunity to provide guidance for lower courts faced with similar assertions of subject matter jurisdiction in conflict with the laws and policies of other nations.

A. The Claims at Issue.

This petition emanates from consolidated antitrust actions filed in 1988 by nineteen states and numerous tag-along private plaintiffs who allegedly purchased or sought to purchase insurance in the U.S. A-34. The petition addresses three discrete claims ("the London reinsurance claims") directed solely against British parties. These parties include the petitioners (who trade in the marketplace known as Lloyd's of London) (the "Lloyd's

defendants"), and certain London-based insurance companies (the "London Company defendants").[2]

The London reinsurance claims allege that the defendants violated U.S. antitrust laws by refusing, in England, to offer reinsurance (insurance for insurance companies) to U.S. and other insurance companies except on the terms and conditions to which the London defendants had agreed. Plaintiffs assert that the U.S. insurance coverage they sought to purchase from U.S. insurers became unavailable or unaffordable as a result of the London-based agreements. A-66-68.

The complaints seek damages and injunctive relief. The requested damage awards seek unspecified damages, to be trebled, attributable to the putative effects on plaintiffs created by the London reinsurers' alleged agreements as to the terms on which they would sell reinsurance to insurers. The requested injunctive relief would have the district court in San Francisco write new rules of conduct for the London insurance markets, based on the court's interpretation of the Sherman Act, and then supervise compliance with those rules in the U.K. by the Lloyd's and London Company defendants over a ten-year period.

B. The Regulatory Framework In Which The Lloyd's And London Company Defendants' Conduct Took Place.

The London insurance markets have long been subject to a regulatory and competitive framework established by the British government.[3] In 1871, by a statute known as the "Lloyd's Act," Parliament formally incorporated the Society of Lloyd's and

[2] Petitioners were also named in a "global conspiracy" claim that purported to link all 32 defendants, foreign and domestic, in a plan to restrict the availability of various types of insurance and reinsurance coverages. The global conspiracy count was not included in the "first wave" of complaints that was led by the State of California, added no factual allegations, and was dismissed by the district court. A-38, 63-64. The court of appeals affirmed the dismissal. A-26.

[3] The district court described in detail the manner in which the London markets operate. A-67-69.

empowered it to regulate the Lloyd's marketplace, already two hundred years old. In the preamble to the Lloyd's Act 1871, Parliament left no doubt that it considered the business conducted at Lloyd's important to Britain's national interest:

> [W]hereas the affairs of the Society, and the business conducted by its members as such, are of large and increasing magnitude and importance ... the management of the affairs of the Society and the incorporation of its members with proper powers would be of great benefit to the shipping and mercantile interests of the United Kingdom ....

When concern was raised in the late 1970's about the governance of Lloyd's, Parliament appointed a committee under the chairmanship of former British High Court Judge Sir Henry Fisher to look into all aspects of the Lloyd's marketplace. This committee's report, entitled "Self-Regulation at Lloyd's: Report of the Fisher Working Party, May 1980," took note of the unique nature of Lloyd's, where insurance is underwritten not by large corporations, but on a subscription basis by syndicates of individuals whose liability is several and unlimited and whose affairs are managed by "underwriting agencies" and "managing agencies" (such as several of the Lloyd's defendants). The Fisher Report concluded that self-regulation by the Society was preferable to direct government control:

> **We have no doubt that Lloyd's will be best served by a properly conducted system of self-regulation.** Indeed, we do not see how it could function in anything like its present form under any other system of regulation. Since the continued success of Lloyd's as an international market for insurance is important in the national interest, it is of national importance that Lloyd's should have an efficient system of self-regulation.

Fisher Report at 3 (emphasis in original).

The London Company defendants named in the London reinsurance claims are incorporated in the United Kingdom, in

accordance with the Companies Act 1985. They are regulated for solvency and in the conduct of their business by the Insurance Companies Act 1982 and associated regulations, and are supervised by the Secretary of State for Trade and Industry. *See* J. Butler, et al., *Reinsurance Law* ¶ A.1.1 at A.1.1-2 (1989).[4]

In adopting the Companies Act 1985 and the Lloyd's Act 1982 after thorough review of the English insurance markets in a changing world economy, the House of Commons and the Fisher Committee concluded that some aspects of those markets needed to be specifically regulated, and others left to regulation by the participants without government intervention. If the court of appeals' decision were to stand, the present suit would upset this set of decisions.

C. The Decisions Below.

The Lloyd's and London Company defendants named in the London reinsurance claims moved to dismiss those claims for lack of subject matter jurisdiction and on grounds of international comity. Noting the two-year investigation that had preceded the institution of the actions before it, the district court found none of the pertinent facts in dispute. A-69-71. Citing allegations that the London reinsurance claims involved conduct that had the requisite effect on American commerce, the district court concluded that it possessed subject matter jurisdiction under the antitrust laws. A-69-71.[5]

[4] Agreements among British insurers and reinsurers (including both Lloyd's and London Company underwriters) relating to the provision of insurance services are expressly exempted from British regulation of anti-competitive agreements. *See Restrictive Trade Practices (Services) Order* 1976, S.I. 1976 No. 98, Schedule ¶ 8. The exemption from anti-competition laws for the British insurance industry is a limited one. British insurers are subject to investigation under the Fair Trading Act 1973 and the Competition Act 1980, and they are also subject to the competition rules of the European Community to the extent their conduct affects trade between states that are community members.

[5] Defendants also moved to dismiss the London reinsurance claims on the ground that plaintiffs lacked standing under the antitrust laws. The courts below rejected that argument. Petitioners here understand that other London defendants will be submitting a petition for certiorari raising the standing issue. Petitioners intend to file a response in support of that petition, pursuant to Supreme Court Rule 12.4.

The district court declined to exercise that jurisdiction, however, under principles of international law and comity articulated by the Court of Appeals for the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America.*[6] The district court concluded that "enforcement of the [U.S.] antitrust laws against activities in the London reinsurance market would lead to significant conflict with English law and policy." A-75. The court found significant English law and policy reflected in the complex web of legislation and self-regulation created by Parliament for the London market. A-72-73.

The district court concluded that "[t]he conflict with English law and policy which would result from the extra-territorial application of the antitrust laws in this case is not outweighed by other factors," and added:

> Although the conduct complained of had effects within the United States, it is not alleged to have excluded competitors from markets or denied consumers access to markets, and it is not alleged to have occurred for that purpose.

A-78.

On appeal, the Ninth Circuit agreed that the exercise of jurisdiction would result in "conflict with a long-established British policy towards a venerable British trade, the underwriting of insurance." A-31.[7] Nonetheless, the court of appeals reversed,

[6] 549 F.2d 597 (9th Cir. 1976) ("Timberlane I"), *appeal after remand*, 749 F.2d 1378 (9th Cir. 1984) ("Timberlane II"), *cert. denied*, 472 U.S. 1032 (1985).

[7] The British government, as *amicus curiae* before the Ninth Circuit, confirmed that "the conflict in this case arises because [plaintiffs] ask this Court to place restrictions on the British industry which is operating under the British regulatory and competition regime and also to subject British nationals to substantial legal liability for conduct the District Court properly found was 'conducted in conformity with English law . . . . [for] a legitimate business purpose.'" *Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Appellees* at 12. The court of appeals did "not doubt" the accuracy of this submission. A-29.

holding that the "significant conflict with English law and policy" was outweighed by plaintiffs' allegation that the Lloyd's and London Company defendants' actions in England had caused an effect in the U.S. A-29-31.[8] The court of appeals did not discuss at all one of the central factors in any analysis of a problem in conflict of laws or extraterritorial jurisdiction: the locus of the relevant conduct.

The court of appeals mistakenly felt constrained in its comity analysis by the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") (codified at 15 U.S.C. § 6a). The FTAIA provides that the Sherman Act does not apply to conduct involving foreign commerce *other than* import commerce unless that conduct has a "direct, substantial and reasonably foreseeable effect" on U.S. commerce.[9] The court of appeals relied on the FTAIA to restrict principles of international comity as no court had done previously: "[i]f a complaint survives the new bar of 15 U.S.C. § 6a because the conduct has a 'direct, substantial, and reasonabl[y] foreseeable effect' on American commerce, it is only in an unusual case that comity will require abstention from the exercise of jurisdiction." A-28.

There is no doubt that in the interrelated world-wide insurance market, just as in the interrelated markets for securities, for foreign exchange, and for precious metals and other commodities, what happens in London, Paris, Tokyo, Hong Kong, and elsewhere, has an "effect" in the United States. This petition, like the Court of Appeals for the Ninth Circuit in *Timberlane*, and the Third Circuit in *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), as well as the *Restatement (Third) of the Foreign Relations Law of the United States* (1987), contends that a finding that foreign activity has an effect on the American economy is the beginning, not the end of the comity analysis. The court of appeals effectively ruled otherwise. This petition asks whether such an approach, which authorizes extraterritorial jurisdiction that will lead to significant conflict with English law and policy, should remain undisturbed. It offers the Court an opportunity to confirm that comity continues to play a vital role in courts' determinations of the exercise of subject matter jurisdiction, to provide guidance to the courts about limits on the extent to which U.S. economic regulation may reasonably be applied to international commercial conduct, and to assign a conflict with foreign law and policy the central role it deserves in the reasonableness inquiry.

[8] The court of appeals found it significant that some of the London Company defendants are subsidiaries of American corporations, even though those parent companies are not named in the complaints and the complaints do not allege that those parents played any role in the events complained of. A-29.

[9] Petitioners did not appeal the district court's finding that jurisdiction was not barred by the FTAIA.

REASONS FOR GRANTING THE WRIT

Since the end of World War II, this Court has shown great concern for international law in a variety of areas. Yet, the Court has never addressed the extent to which the United States can apply its major economic regulatory legislation to wholly foreign actors and conduct. In the absence of an authoritative answer to this question, a conflict among lower courts and commentators has developed.

This petition presents the Court the opportunity to halt the proliferation of conflicting rulings. The claims from which it arises involve wholly foreign actors and conduct, an acknowledgement by both the district and circuit courts that application of U.S. law to that conduct will result in serious conflict with English law and policy, and a circuit court analysis that not only ignores the respect for foreign law and customs this Court has shown in other contexts, but also adds more confusion by misconstruing a federal statute in order to restrict principles of international comity. If the decision of the court below is allowed to stand, the settled expectations of generations of foreign traders in foreign regulated markets will be upset, and the considered judgments of Parliament regarding the regulation of an important British industry will be overruled.

ARGUMENT

I. The Lack of Definition of the Extraterritorial Reach of U.S. Economic Regulatory Legislation Has Resulted in Conflict Among Courts and Commentators.

A. *The Court Has Never Considered The Extent To Which U.S. Economic Regulatory Jurisdiction Can Be Applied Extraterritorially.*

The Court's sensitivity to cases of international importance is shown by the many international law issues it has agreed to hear, some more than once. The Court has, for example, confirmed that the law of claims against foreign states is federal law,[10] and it has defined the scope of that body of law.[11] The Court has upheld commercial agreements between Americans and foreign parties selecting foreign judicial or arbitral forums against claims that such agreements "oust the jurisdiction of [American] courts."[12] The Court has set out and then limited the Act of State doctrine.[13]

The Court has passed on the relation of the Federal Rules of Civil Procedure to the requirements of foreign law,[14] and it has construed the Hague Evidence and Service Conventions in light of U.S. and state rules of procedure.[15] Twice recently the Court

[10] *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

[11] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

[12] *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 6 (1972); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

[13] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *First Nat'l City Bank v. Banco Para el Comercio de Exterior de Cuba*, 462 U.S. 611 (1983); *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990).

[14] *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958).

[15] *Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987); *Volkswagenwerk Aktiengesellschaft A.G. v. Schlunk*, 486 U.S. 694 (1988).

has reviewed U.S. rules of personal jurisdiction as applied to foreign parties.[16]

The Court has heard five cases involving the Warsaw Convention concerning the liability of international air carriers.[17] It has decided a case involving a bilateral tax treaty,[18] and it has considered the effect of the General Agreement on Tariffs and Trade on a U.S. countervailing duty statute.[19] The Court has reviewed three Jones Act claims by foreign seamen[20], and it has ruled on an effort by a U.S. labor union to organize crewmen on foreign flag ships.[21] The Court has rejected claims by American citizens employed abroad by American employers to be covered by the Eight Hour law[22] and by Title VII of the Civil Rights Act of 1974.[23]

Many, although not all, of these cases have involved statutes of relatively limited application. But the Court has thus far left the international application of the country's most important economic regulatory legislation — the antitrust and securities laws — entirely to the lower courts. The significance of guidance to the courts in their application of these laws can only increase as industries become more international.

[16] *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

[17] *Alitalia-Linee Aeree Italiane, S.p.A. v. Lisi*, 390 U.S. 455 (1968); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984); *Air France v. Saks*, 470 U.S. 392 (1985); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989); *Eastern Airlines, Inc. v. Floyd*, ___ U.S. ___, 111 S. Ct. 1489 (1991).

[18] *United States v. Stuart*, 489 U.S. 353 (1989).

[19] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971).

[20] *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970)

[21] *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

[22] *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949).

[23] *EEOC v. Arabian American Oil Co.*, ___U.S. ___, 111 S. Ct. 1227 (1991).

B. *The Differing Interest-Balancing Formulas.*

In the absence of standards articulated by this Court concerning the proper extraterritorial reach of U.S. economic and regulatory legislation, a variety of conflicting rulings and views has resulted. Two circuits and the ***Restatement of the Foreign Relations Law of the United States*** have developed multi-factor balancing tests designed to weigh the interests of the nations and parties concerned by a claim that American law should be applied to foreign actors and conduct. These tests differ as to the factors to be considered, but they are consistent with this Court's teaching in international law cases. Several other circuits, however, have rejected or altered the balancing concept. In this case, one of the two courts that had led the way to a modern approach to the resolution of international conflicts has now retreated from this approach, thereby furthering the confusion.

i. *The Court of Appeals for the Ninth Circuit.*

The first, and probably best-known, case to produce a test for balancing the interests of concerned nations and parties was *Timberlane*. In *Timberlane*, the Ninth Circuit formulated a tripartite approach to assessing whether the exercise of jurisdiction by the U.S. courts is proper over an antitrust claim based on foreign conduct. First, the court asked whether the alleged restraint had an actual or intended effect on American commerce. 549 F.2d at 615. This was a restatement of the so-called *Alcoa* "effects test." Second, the court asked whether the allegations were "of such a type and magnitude so as to be cognizable as a violation of the Sherman Act." *Id.* The third part of the court's analysis is of central concern here: "As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover [the allegations of the complaint]?" *Id.*

The Ninth Circuit adopted this approach out of sensitivity to the concerns of other nations, who "have sometimes resented and protested, as excessive intrusions into their own spheres, broad assertions of authority by American courts," 549 F.2d at

609, and because it viewed a jurisdictional test that looks solely to effects as "incomplete because it fails to consider other nations' interests." *Id.* at 611-12. The court adopted what it called a "jurisdictional rule of reason" that would weigh the following seven factors in assessing the propriety of an extraterritorial application of jurisdiction:

1. the degree of conflict with foreign law or policy;
2. the nationality or allegiance of the parties and the locations or principal places of business of corporations;
3. the extent to which enforcement by either state can be expected to achieve compliance;
4. the relative significance of effects on the United States as compared with those elsewhere;
5. the extent to which there is explicit purpose to harm or affect American commerce;
6. the foreseeability of such effect;
7. the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

549 F.2d at 613-14.[24]

[24] The district court below found the first, second, third, and fifth *Timberlane* factors to weigh against the exercise of jurisdiction, and the seventh factor to be neutral. A-75-77. The court of appeals found that the first factor weighed against the exercise of jurisdiction and that the second through sixth factors favored jurisdiction. A-29-31. The court of appeals did not consider the seventh factor.

After remand, the Ninth Circuit explained in greater detail exactly how the factors listed above should be weighed. The court stressed that a significant conflict with foreign law or policy, "unless outweighed by other factors in the comity analysis, is itself a sufficient reason to decline the exercise of jurisdiction. . . ." 749 F.2d at 1384.

Timberlane's balancing approach, as the court of appeals here noted, "has commanded a wide following." A-28, *quoting* Atwood & Brewster, *Antitrust and American Business Abroad* 1, 162-63.

ii. *The Court of Appeals for the Third Circuit.*

In *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), the Third Circuit panel debated the approach to exercising U.S. economic regulatory jurisdiction in the international arena. Judge Adams, writing separately, argued that once the minimum contacts to support subject matter jurisdiction were found to be present, the court was obligated to hear the case and apply the Sherman Act to the conduct charged, leaving any consideration of international concerns to the question of remedy. *Id.* at 1299, 1302. The majority, in an opinion by Judge Weis, disagreed:

> This may, indeed, be a situation where the consequences to the American economy and policy permit no alternative to firm judicial action enforcing our antitrust laws abroad. But before that step is taken, there should be a weighing of competing interests.

Id. at 1296.

The court in *Mannington Mills* said that it was in substantial agreement with the balancing process adopted by the Ninth Circuit in *Timberlane*, but it put forward a different list of the factors it believed should be considered in assessing the appropriateness of an extraterritorial application of American law and added several factors that could make a material difference

in the analysis.[25] Moreover, it appears that the Third Circuit would pay more attention to the foreign relations of the U.S.

iii. *The Restatement of the Foreign Relations Law of the United States.*

In 1987, the American ~~Law Ins~~titute published a new Restatement of Foreign Relations Law, entitled *Restatement (Third)*, seeking to establish order among the various approaches to the subject not only in the United States but also in, for instance, the European Community. The *Restatement* concluded that under international law a state has jurisdiction to prescribe law on the basis of territoriality (including effects) or nationality, § 402, but only if the exercise of jurisdiction is not unreasonable, § 403(1). Section 403(2) goes on to provide that whether the exercise of jurisdiction over a person or activity is unreasonable is to be determined by evaluating all relevant factors, including, where appropriate:

> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connection, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designated to protect;

---

[25] These factors were: possible effect upon foreign relations if the court exercises jurisdiction and grants relief; if relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and whether a treaty with the affected nations has addressed the issue. 595 F.2d at 1297-98.

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

These factors purport to restate not just U.S. law but international law. Particular provisions of the *Restatement (Third)* illustrate U.S. applications in areas of recurring importance — *e.g.* taxation, §§ 411-413; antitrust, § 415; securities regulation, § 416; and discovery, § 442. Section 415(3), for example, says that agreements in restraint of U.S. trade made and carried out entirely outside the U.S. are subject to American jurisdiction "if such agreements or conduct have substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable." The official commentary to § 415 emphasizes that "[t]he underlying test of jurisdiction under §§ 402 and 403 . . . is reasonableness, and the links set out in this section [§ 415] are illustrative and not conclusive."

C. *The Approaches Of Other Circuits.*

The courts of appeals that have thus far considered the approach of the *Restatement (Third)* and its predecessor have been divided.[26] The second *Restatement's* test (which also endorsed

[26] There was no Restatement (First).

a balancing of various factors) was cited by the Ninth Circuit in *Timberlane*, which nonetheless chose to create its own formula. 549 F.2d at 614 n.31. The Court of Appeals for the Seventh Circuit approved the approaches of both *Restatement (Second)* and *Restatement (Third)*, then in draft form. *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 345-46 (7th Cir. 1983), *cert. denied*, 469 U.S. 1106 (1985). The Court of Appeals for the Eleventh Circuit essentially rejected the *Restatements'* approach. *In re Grand Jury Proceedings (United States v. Bank of Nova Scotia II)*, 740 F.2d 817, 826-28 (1984), *cert. denied*, 469 U.S. 1106 (1985).

A divided panel of the Court of Appeals for the District of Columbia Circuit, in an anti-injunction context, affirmed (2-1) the statement in § 403(1) of *Restatement (Third)* that international law prohibits the assertion of prescriptive jurisdiction unsupported by reasonable links between the forum and the controversy, but rejected the appropriateness of balancing competing interests as called for by § 403(2). *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 951-522 (D.C. Cir. 1984) (Wilkey, J.). The *Laker* court stated, "*An English or American Court cannot refuse to enforce a law its political branches have already determined is desirable and necessary.*" *Id.* at 949 (emphasis in original). The court did not find interest balancing to represent a rule of international law, or that a "more reasonable" jurisdiction displaces a "less reasonable" one. *Id.* at 950, 952. Another divided panel of the D.C. Circuit, in a securities case, attempted to navigate between tests of the Third, Eighth, and Ninth Circuits, as contrasted with the Second Circuit, and stated in a footnote that the *Restatement* was no help. *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30-33 and 32 n.2 (D.C. Cir. 1987) (Bork, J.).[27]

The Court of Appeals for the Second Circuit, in antitrust cases, apparently continues to apply a modified "effects" test

[27] For other cases citing *Restatement (Second)* § 40 and *Restatement (Third)* §§ 403, 415, 416, 441, and 442, *see* American Law Institute, *Restatement of the Law: The Foreign Relations Law of the United States*, Cumulative Annual Supplement 1990-91 (1991).

harking back to its own decision in *United States v. Aluminum Company of America*, 148 F.2d 416, 441-45 (2d Cir. 1945). In *Alcoa*, the Second Circuit undertook to apply international law in holding jurisdiction proper upon a showing of some domestic effect if that effect was either intended or substantial. The court has declined to revisit *Alcoa* in the wake of *Timberlane*. *See National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981). In securities cases, however, the Second Circuit has developed a test that does not balance competing national interests or weigh the *Restatement* factors but, instead, depends largely on whether the plaintiff is American or foreign, and whether the loss and the culpable conduct occurred in the United States or abroad. Adding to the confusion, two separate panels have applied this approach differently. *Compare Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261-62 (2d Cir. 1989), with *AVC Nederland B.V. v. Atrium Invest. Partnership*, 740 F.2d 148, 152 (2d Cir. 1984).

II. This Case Provides the Ideal Circumstances for the Court to Offer Direction on the Extent to which U.S. Economic Regulatory Legislation Can Be Applied Extraterritorially.

A. *This Case Presents a Conflict With English Law and Policy Acknowledged by the District Court and the Court of Appeals.*

Whether the issue of when and to what extent the U.S. can impose its major economic regulatory legislation on wholly foreign actions and conduct is denominated one of "comity," "subject matter jurisdiction," "jurisdiction to prescribe," "foreign relations law," or "international law," it is an issue that has been actively debated, litigated, and commented upon for nearly five decades. A survey of the *Index to Legal Periodicals* reveals that in the last two years alone, the issue has been the subject of 96 articles, notes or comments. It is an issue that has "percolated" sufficiently to be ripe for treatment by this Court.

This case provides the perfect opportunity for the Court to address the issue. The London reinsurance claims present the starkest, most direct challenge ever brought under the guise of

the antitrust laws by American officials — here, state attorneys general — to the structure, regulation and conduct of a foreign market. It presents a conflict with English law and policy that has been acknowledged by the district court, the circuit court and the British government. Never has an American court held itself competent in the face of such a conflict to construct rules for the conduct of business subject to the regulatory authority of a foreign sovereign taking place in a foreign market, and undertaken by foreign actors.[28]

Moreover, unlike every other antitrust case that has come before this Court involving foreign commerce, the three claims at issue here involve wholly foreign actors and conduct. *Compare, e.g., United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) ("Here we have a contract, combination and conspiracy entered into by parties within the United States and made effective by acts done therein"); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951) (rejecting argument that *American* business must be free to participate in foreign cartels); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706 (1962) ("As in *Sisal*, the conspiracy was laid in the United States [and] was effectuated both here and abroad").

B. *The Court Below Did Not Accord the Interests of a Foreign Nation the Respect this Court's Precedents and International Law Require.*

In view of the acknowledged conflict with British regulatory law and policy, the court of appeals' ruling reflects a distressing lack of respect for the interests of foreign nations — interests this Court has repeatedly said are deserving of higher regard. The absence of respect for these interests by the court of appeals, in a case that inevitably will receive wide attention here and abroad, calls for review by this Court.

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[28] In *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986), this Court wrote, "[T]he American antitrust laws do not regulate the competitive conditions of other nations' economies".

Since the landmark *Alcoa* decision in 1945, when Judge Learned Hand ruled that extraterritorial application of U.S. law must be measured by "limitations customarily observed by nations upon the exercise of their powers," 148 F.2d at 443, this Court has stressed that American courts should weigh the interests of foreign nations carefully before approving or embarking on a course of action likely to cause a conflict with foreign law. Thus, in *Société Internationale v. Rogers*, 357 U.S. 197 (1958), the Court weighed the interest of the United States in enforcing the Trading with the Enemy Act against Switzerland's interest in its bank secrecy laws. The Court found "weighty" the plaintiff's fear of criminal prosecution if it complied with the district court's discovery order, and held that dismissal of plaintiff's complaint was a disproportionate sanction.

The Court has continued to insist that the interests of foreign nations be considered when conflicts arise. In *Aerospatiale*, 482 U.S. 522 (1987), the Court held that "the concept of international comity" required a district court to undertake a "particularized analysis of the respective interests of the foreign nation and the requesting nation" in determining whether a party seeking discovery abroad should be required to resort to the procedures of the Hague Evidence Convention before the liberal procedures of the federal rules. 482 U.S. at 543-44. Justice Stevens wrote: "The exact line between reasonableness and unreasonableness in each case must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke." 482 U.S. at 546. Justice Blackmun, for the minority, sought "more definite rules than the ad hoc approach endorsed by the majority." 482 U.S. at 554. Citing many of the cases noted in Part I of this petition, Justice Blackmun wrote:

> Comity is not just a vague political concern favoring international cooperation when it is in our interest to do so. Rather it is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill . . . . [T]he threshold question in a comity analysis is whether there is in fact a true conflict between domestic and foreign law. When there is a conflict, a court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws. In doing so, it should perform a tripartite analysis that considers the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime.

482 U.S. 555.[29]

The court of appeals in this case followed the prescription neither of Justice Stevens nor of Justice Blackmun. It did not follow Judge Schwarzer's "particularized analysis" of the respective interests of the concerned states, as it seems Justice Stevens would have done, and it did not explore means of conflict avoidance, as suggested by Justice Blackmun. The court of appeals concluded that the United States should exercise antitrust jurisdiction over the British insurance and reinsurance market, "[u]nless we were to create a kind of analogue of the McCarran-Ferguson Act for insurance business regulated by a foreign country and treat Lloyd's as immune." A-31.

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[29] Similarly, in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), the Court wrote:

> The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interest on the part of the plaintiff or the forum state.

480 U.S. at 115. The *Asahi* case, of course, concerned jurisdiction to adjudicate (personal jurisdiction) and did not directly address jurisdiction to prescribe. In that related context, however, the Court recognized that an inquiry into reasonableness should be undertaken to measure the extent of possible infringement on nations' interests.

This reasoning would result in immunity from the U.S. antitrust laws (with certain exceptions) for insurers and reinsurers subject to regulation by Illinois or New York or California, but allow application of the Sherman Act without any limitation to insurers regulated by the United Kingdom or France or Switzerland. To paraphrase Judge Noonan, who found no authority warranting "a special immunity for insurance regulated by Britain" (A-31), no authority warrants creating a special regime of antitrust liability for foreign insurers. The alternative to application of the Sherman Act to the British insurance industry is an industry subject to careful organization and regulation, under the insurance and competition framework of British law. This regulatory oversight would be upset — if not destroyed — if the decision below were permitted to stand.

C. *The Court Below Misread the FTAIA to Restrict the Role of International and Foreign Relations Law in Challenges to Extraterritorial Application of the Antitrust Laws.*

The courts below accepted the assertion by the Lloyd's and London Company defendants and the British government that application of U.S. antitrust laws to the conduct alleged in the London reinsurance claims would lead to a significant conflict with British law and policy. But the court of appeals reversed the district court, and held jurisdiction proper, in large part because of a misguided application of the 1982 amendment to the Sherman Act. This error in statutory construction underscores the need for review by this Court. No other court of appeals has construed the amendment. The Ninth Circuit's interpretation, if not corrected, will inevitably give rise to further confusion in the lower courts over the extent of the extraterritorial reach of U.S. economic regulatory legislation.

In the FTAIA, Congress declared that in antitrust cases involving restraints affecting U.S. *export* commerce, plaintiffs would be required to demonstrate that the alleged restraint had a direct, substantial and reasonably foreseeable effect on domestic commerce. The purpose of the FTAIA was to promote American exports by providing immunity for anticompetitive conduct that operates only abroad. 128 Cong. Rec. H4981 (daily ed. Aug. 3, 1982) (Statement of Rep. Rodino); United States Department of Justice, Antitrust Enforcement Guidelines for International Operations § 4.1, Antitrust and Trade Reg. Rep. (CCH) ¶ 13,109.10 at 20,611.

The FTAIA's legislative history unambiguously indicates Congress' intent that the statute should "have no effect on the courts' ability to employ notions of comity or otherwise take account of the international character of the transaction." H.R. Rep. No. 97-686 at 13 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 2431, 2498, citing *Timberlane*. Yet the court below somehow derived from the FTAIA a new rule of jurisdictional analysis for international antitrust cases that all but eliminates consideration of reasonableness and comity:

> We do not believe a *Timberlane* analysis . . . can be unaffected by the statute. If a complaint survives the new bar of 15 U.S.C. § 6a because the conduct has "a direct, substantial, and reasonabl[y] foreseeable effect" on American commerce, it is only in an unusual case that comity will require abstention from the exercise of jurisdiction. But as the legislation does not eliminate comity, a court should look to see if the case before it is one in which comity still has a role to play.

A-28.

The Ninth Circuit's reliance on the FTAIA not only turned the intent of Congress around, in an instance in which that intent is unambiguous, it also made a mockery of the *Timberlane* balancing test, which was designed to embody a "jurisdictional rule of reason." In the court of appeals' use of the FTAIA, once the requisite effect is alleged, the significance of all the other ingredients of reasonableness — whether they be those set forth in *Timberlane*, or in *Mannington Mills*, or in the *Restatement* or some other formula — is reduced virtually to nothing. After discussing some (but not all) of the *Timberlane* reasonableness factors, the court "balanced" them as follows:

> No authority warrants us in creating a special immunity for insurance regulated by Britain. Comity does not require it. *Nothing overcomes the weight of the findings already made under the Foreign Trade Antitrust Improvements Act.*

A-31 (emphasis added).

That was not the *Timberlane* test. A "balancing" that begins with the assumption that comity must work uphill to overcome the FTAIA is no part of *Timberlane* as the Ninth Circuit decided it or, more importantly, as Congress understood it when it enacted the FTAIA. The balancing process contemplated by *Timberlane*, and the view of jurisdictional reasonableness it represented, has been left in shreds. A U.S. court now claims the power to regulate the London insurance market, even though there is no evidence that when Congress passed the FTAIA to cut back on the reach of the antitrust laws with respect to exports, it intended at the same time to expand the reach of those laws to govern an industry and a market regulated abroad.

It is striking that in checking off the list of factors in *Timberlane*, Judge Noonan went from *first* to *sixth*, and completely eliminated the seventh factor — the place of the challenged conduct. Putting the point in classical conflict of laws terms, whether a given law of state *A* should apply to an activity with links both to state *A* and to state *B* depends in the first instance on the place of conduct and the place of effect. Judge Noonan's omission of the seventh factor of *Timberlane* added to the weight attributable to "effects" in the balancing process, and compounded the error created by his misapplication of the FTAIA. In Judge Noonan's formulation, effect in state *A* (here the U.S.) is all that matters. To let this double mistake stand would countenance an unfortunate, unwarranted, and unintended extension of American jurisdiction to an industry centered in, governed by and consisting of the nationals of a friendly foreign sovereign, and will make further similar conflicts inevitable.

CONCLUSION

This case is not one that pits the foreign relations of the U.S. against those of a foreign power. Indeed it is not the federal government at all, but a collection of state attorneys general and private plaintiffs, that propose to intervene in the international relations of the U.S. In *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972), Chief Justice Burger wrote:

> We cannot have trade and commerce in world markets . . . exclusively on our terms, governed by our laws, and resolved in our courts.

This petition asks this Court to uphold that statement, and apply it in a case in which the courts below found that application of U.S. law would create a significant conflict with foreign law and policy. The petition for certiorari should be granted.

Respectfully submitted,

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Dated: January 13, 1992

APPENDIX

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Opinion of the Ninth Circuit

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re INSURANCE ANTITRUST LITIGATION

Argued and Submitted March 15, 1991

Decided June 18, 1991

Nos. 89-16405, 89-16513 to 89-16531

ACE CHECK CASHING, INC.; Acme Corrugated Box Company, Inc.; Anastasios Markos, t/a Municipal Exxon; Bay Harbor Park Homeowner's Association, Inc.; Bensalem Township Authority; Big D Building Supply Corporation, et al.,

Private Plaintiffs,
Plaintiffs-Appellants,

and

State of Alabama, et al.,

Plaintiffs,

v.

AETNA CASUALTY AND SURETY COMPANY; Allstate Insurance Company; Cigna Corp.; Hartford Fire Insurance Company, et al.,

Defendants-Appellees.

STATE OF CALIFORNIA; City of Lafayette, City and County of San Francisco; County of San Benito,

Plaintiffs-Appellants,

and

State of Alabama, et al.,

Plaintiffs,

v.

AETNA CASUALTY AND SURETY COMPANY; Allstate Insurance Company; Cigna Corp.; Hartford Fire Insurance Company, et al.,

Defendants-Appellees.

STATE OF CALIFORNIA; City of Lafayette, City and County of San Francisco; County of San Benito,

Plaintiffs-Appellants,

v.

INSURANCE SERVICES OFFICE, INC., CNA RE (U.K.) LTD.; Continental-Reinsurance Corporation; Union-America Insurance Co.; Edwards & Payne Ltd.; Excess Insurance Co., Ltd.; General Reinsurance Corp.; Thomas A. Greene & Company, Inc.; Kemper Reinsurance London; Lloyd's Underwriters & Brokers; Mercantile & General Reinsurance Company of America; North American Reinsurance Corporation; Oxford Syndicate Mgmt. Ltd.; (sued herein as K.F. Adler & Others (U.A.) Ltd.); Prudential Reinsurance; Reinsurance Association of America; Terra Nova Insurance Co.; Aetna Casualty and Surety Company; Allstate Insurance Company; Winterthur Reinsurance Corporation of America; Cigna Corp.; Hartford Fire Insurance Company,

Defendants-Appellees.

STATE OF NEW YORK; Roosevelt Island Operating Authority; Village of Groton; Village of Lake Success,

Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; Aetna Casualty and Surety Company; Cigna Corp.; Allstate Insurance; et al.,

Defendants-Appellees.

COMMONWEALTH OF MASSACHUSETTS; Town of Hanover; Town of Milford,

Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; Aetna Casualty and Surety Company; Cigna Corp.; Allstate Insurance; et al.,

Defendants-Appellees.

STATE OF MINNESOTA,

Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; Aetna Casualty and Surety Company; Cigna Corp.; Allstate Insurance; et al.,

Defendants-Appellees.

STATE OF WEST VIRGINIA; City of Clay; County of Hancock; County of Mineral; County of Wirt,

Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; Aetna Casualty and Surety Company; Cigna Corp.; Allstate Insurance; et al.,

Defendants-Appellees.

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; Aetna Casualty and Surety Company; Cigna Corp.; Allstate Insurance; et al.,

Defendants-Appellees.

CITY OF MOBILE; State of Alabama; City of Birmingham,

Plaintiffs-Appellants,

v.

AETNA CASUALTY AND SURETY COMPANY; Winterthur Reinsurance Corporation of America; Cigna Corp.; Hartford Fire Insurance Company; Allstate Insurance,

Defendants-Appellees.

STATE OF ARIZONA,

Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; Allstate Insurance; Aetna Casualty and Surety Company; Cigna Corp.; et al.,

Defendants-Appellees.

STATE OF MARYLAND,

Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; Allstate Insurance; Aetna Casualty and Surety Company; Cigna Corp.; et al.,

Defendants-Appellees.

STATE OF WASHINGTON; County of Cowlitz,

Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; Allstate Insurance; Aetna Casualty and Surety Company; Cigna Corp.; et al.,

Defendants-Appellees.

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; Allstate Insurance; Aetna Casualty and Surety Company; Cigna Corp.; et al.,

Defendants-Appellees.

STATE OF COLORADO,

Plaintiff-Appellant,

v.

WINTERTHUR REINSURANCE CORPORATION OF AMERICA; Aetna Casualty and Surety Company; Cigna Corp.; Hartford Fire Insurance Company; Allstate Insurance,

Defendants-Appellees.

STATE OF OHIO; Township of Jackson; County of Hardin,

Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; Allstate Insurance; Aetna Casualty and Surety Company; Cigna Corp.; et al.,

Defendants-Appellees.

STATE OF CONNECTICUT,

Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; Allstate Insurance; Aetna Casualty and Surety Company; Cigna Corp.; et al.,

Defendants-Appellees.

COMMONWEALTH OF PENNSYLVANIA; County of Schuylkill; City of Altoona; City of York; Borough of Chambersburg,

Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; Allstate Insurance; Aetna Casualty and Surety Company; Cigna Corp.; et al.,

Defendants-Appellees.

STATE OF ALASKA,

Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; Allstate Insurance; Aetna Casualty and Surety Company; Cigna Corp.; et al.,

Defendants-Appellees.

STATE OF MONTANA; County of Teton,

Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; Allstate Insurance; Aetna Casualty and Surety Company; Cigna Corp.; et al.,

Defendants-Appellees.

STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; Allstate Insurance; Aetna Casualty and Surety Company; Cigna Corp.; et al.,

Defendants-Appellees.

STATE OF LOUISIANA; Cities of Baton Rouge, New Orleans, Slidell, Nachitoches and Eunice,

Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; Allstate Insurance; Aetna Casualty and Surety Company; Cigna Corp.; et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California.

Before BEEZER and NOONAN, Circuit Judges, and SINGLETON,* District Judge.

NOONAN, Circuit Judge:

Nineteen states and numerous private parties brought antitrust suits against the defendants named above. These suits were consolidated in the district court and were ultimately dismissed. The plaintiffs appeal. We reverse the district court and remand.

FACTUAL BACKGROUND

The undisputed facts are set out by the district court in *In re Insurance Antitrust Litigation*, 723 F. Supp. 464, 468-70 (N.D. Cal. 1989). We summarize:

Commercial general liability insurance (CGL) protects the insured against the risk of liability to third parties for bodily injury or property damage. It is purchased by businesses, nonprofit entities, and governmental units. Defendants Hartford Fire Insurance Company (Hartford), Allstate Insurance Company (Allstate), Aetna Casualty and Surety Company (Aetna), and CIGNA Corporation (CIGNA) are sellers of CGL.

In distinction from these primary insurers, there are reinsurers to whom the primary insurers turn to share their risk. The terms and availability of reinsurance directly affect the terms and availability of primary insurance. In turn, retrocessional insurance – insurance for reinsurers – has an impact on the terms of reinsurance and primary insurance. The defendant reinsurers in this case are domestic – *e.g.*, General Reinsurance Corporation (General Re) – and also foreign. The foreign defendant companies include one Swiss corporation, Winterthur Swiss

* The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

Insurance Company (Winterthur); and six "London Company Market" corporations, and all of them subsidiaries of American corporations: Terra Nova Insurance Co., Ltd. (Terra Nova); Unionamerica Insurance Co., Ltd. (Unionamerica); Continental Reinsurance Co., (U.K.) Ltd. (Continental Re); Excess Insurance Group, Ltd. (Excess); Kemper Reinsurance London, Ltd. (Kemper Re); and CNA Re (U.K.) Ltd.

Reinsurance is arranged by specialized brokers and underwriters. Much reinsurance is done by syndicates doing business through Lloyd's of London. A variety of defendants here are underwriters for these reinsurance syndicates—*e.g.*, Merrett Underwriting Agencies Management, Ltd. (Merrett) and Three Quays Underwriting Management Ltd. (Three Quays). Thomas A. Greene and Co., Inc. (Greene) is an American reinsurance broker, a defendant here. Ballantyne, McKean and Sullivan Ltd. (Ballantyne) and R.K. Carvill & Co., Ltd., (Carvill) are London reinsurance brokers, defendants here. There are also individual defendants associated with reinsurance—*e.g.*, Peter North Miller, the chairman of the Council of Lloyd's, its governing body; and Robin A.G. Jackson, chief underwriter for Merrett.

Two insurance associations are also defendants. One is Reinsurance Association of America (RAA), which principally engages in lobbying. The other is the Insurance Service Office (ISO). ISO has a key role in the regulation of insurance by the several states. Formed in 1971 by the merger of eleven insurance rating bureaus, ISO is an association of over fourteen hundred property and casualty insurers. It develops standard forms of policies. It collects statistical data and estimates risks relevant to the forms. In those states where regulators formally approve the forms, ISO presents the forms for approval.

In 1984, Hartford expressed its dissatisfaction with the standard ISO form for CGL insurance. In particular, Hartford was displeased with the way the form insured against "occurrences" of liability during the life of the policy. Such insurance had "a long tail," *i.e.*, years after the policy had expired, a claim might

be made upon it for an occurrence during the life of the policy. Hartford wanted a "claims made" form to replace the "occurrences" form. Under a "claims made" form only claims made during the life of the policy would be paid. Hartford also objected to coverage of liability for accidental pollution in the standard CGL form.

Led by Hartford, the defendant primary insurers exerted concerted pressure on ISO to get it to withdraw its form for CGL insurance. In June 1984 Hartford persuaded major American reinsurers to agree to boycott the ISO form. Hartford, Aetna, Allstate and CIGNA then joined forces to persuade key underwriters at Lloyd's to agree to boycott the form. The defendants used reinsurance brokers to convey their message. Leading underwriters in London responded to the American request by threatening a boycott of insurance written on the form. ISO began to retreat. In September 1984 ISO agreed to the unprecedented presence of domestic and foreign reinsurers at its executive committee meeting of September 20, 1984. Four reinsurance underwriters from Lloyd's conveyed their insistence on Hartford's terms. Change the form or get no reinsurance was their theme. ISO responded by eliminating accidental pollution coverage and by approving a claims made form with a date after which claims could not be filed. ISO also continued to offer a CGL occurrence form.

The reinsurance defendants continued to press for elimination of the occurrence form. They announced, publicly and privately, that there would be no reinsurance for primary insurers writing on the occurrence form, and they refused to renew long-standing reinsurance treaties with primary insurers in the United States unless they agreed to abandon the occurrence form. As a result of the reinsurers' actions, primary insurers were precluded from selling long tail insurance and also from selling accidental pollution insurance. Whether these varieties of insurance disappeared entirely is not clear; what is alleged is that their availability was substantially diminished. In most states where a regulatory state agency approved insurance forms, ISO obtained approval of its new CGL form. Thereafter, ISO

withdrew its data collection and risk-estimation support for the pre-1984 form.

In late 1985 Hartford and Aetna took the lead in urging ISO to develop standard forms for two others types of CGL insurance: umbrella and excess. With the cooperation of Merrett, Three Quays and Allstate, these standard forms were prepared and approved by ISO.

London reinsurers including Unionamerica, Terra Nova, Excess, Kemper Re and Continental Re, plus the Lloyd's underwriters Merrett and Edwards and Payne agreed to boycott reinsurance and insurance policies for United States property seepage and pollution exposures. The agreement is memorialized in the "Non Marine London Market Agreement 1987," signed by over forty retrocessional reinsurers at Lloyd's and the London Company Market. The parties to the agreement agreed to accept retrocessional reinsurance only from reinsurers who signed a letter of intent stating the following:

> We hereby agree that we will use our best endeavors to ensure that all U.S.A. and Canadian exposed insurance/reinsurance business attaching on or after 1st January 1987 will only be written where the original business includes a seepage and pollution excluding clause wherever legal and applicable.

The effect of this agreement was to deny insurance consumers in the United States property coverage for seepage and pollution.

The Markets

As the plaintiffs have presented their case, the markets affected by the defendants' conduct are (1) the market in the United States for CGL insurance, (2) the market in the United States for excess and umbrella CGL insurance, (3) the market in the United States for property insurance, (4) the market in the United States and the United Kingdom for reinsurance, and (5) the market in the United Kingdom for retrocessional insurance.

The Suits

The complaint filed by California is representative of the claims of Alabama, Arizona, California, Massachusetts, New York, West Virginia, and Wisconsin. In its first claim, California alleges that the American reinsurer defendants; the four primary insurer defendants; Winterthur; and Greene conspired in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, to restrict the terms on which reinsurance would be offered for CGL risks and to refuse to provide reinsurance coverage for CGL risks unless ISO agreed to amend its 1984 CGL forms. In its second claim, California alleges that named Lloyd's underwriters; the four primary insurer defendants; and the brokers Greene and Carvill conspired to the same effect. In the third claim, California alleges that the Lloyd's underwriters; the four primary insurers; the American reinsurers; Winterthur; and Greene and Carvill conspired to the same effect.

In its fourth claim, California includes as defendants RAA and ISO together with the primary insurers; the Lloyd's underwriters; the American reinsurers; Winterthur, and Greene and Carvill. California charges them with conspiracy to eliminate pollution coverage and retroactive coverage from the 1984 claims-made form of ISO.

California's fifth claim is against five named Lloyd's underwriters; against Peter Miller and Robin A.G. Jackson; and against the London reinsurance broker Ballantyne, charging them with violation of section 1 of the Sherman Act by conspiracy to restrict the terms on which reinsurance would be provided for CGL risks; to refuse to reinsure CGL risks written on occurrence form; and to eliminate reinsurance on long-tail risk covered by occurrence policies.

The sixth claim for relief names the Lloyd's underwriters; London company reinsurers, Unionamerica, Terra Nova, and CNA Re; and London reinsurance broker Ballantyne as conspirators to violate the Sherman Act by restricting the terms on which CGL reinsurance would be provided and by limiting the availability in the United States of pollution coverage.

In the seventh claim California charges ISO; Aetna, Allstate and Hartford; and the underwriters Merrett and Three Quays with violating the Sherman Act by agreeing to, and promulgating, model forms for umbrella and excess insurance.

The eighth claim of California is that the six named London Company reinsurers plus Merrett conspired to restrict the terms on which property insurance and reinsurance coverage would be provided for North American risks.

The ninth to eleventh claims of California are for violations of state law—of, respectively, the Cartwright Act, California Business and Professional Code, § 16720 et seq.; the Unfair Insurance Trade Practices Act, California Insurance Code, § 790 et seq.; and the Unfair Competition Act, California Business and Professions Code § 17200 et seq. No defendants are named in these claims but it is asserted that all of the conspiracies federally charged violated the three state laws invoked here.

The complaint of Connecticut is representative of complaints filed after the California complaint by Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Minnesota, Montana, New Jersey, Ohio, Pennsylvania, and Washington. There is substantial overlap between the California and Connecticut complaints. Connecticut, however, in its first claim charges all of the defendants with violation of section 1 of the Sherman Act "by a conspiracy with the purpose and with the effect of shrinking the scope of CGL property/casualty insurance and reinsurance and retrocessional reinsurance in connection therewith."

PROCEEDINGS

In March 1988 eight plaintiff states filed California-style complaints. In June 1988 ten additional states filed Connecticut-style complaints. Louisiana later joined this group, and Minnesota amended its complaint to conform to the Connecticut style. Various private plaintiffs joined in; all but two—from Illinois and Florida—were from states that were already plaintiffs.

The defendants filed five motions asking the district court to dismiss the suits for failure to state a cause of action or, in the alternative, to grant summary judgment. On October 10, 1989 the district court gave judgment for the defendants for reasons that will be taken up *infra*. Doing so, the district court treated its action as dismissal for failure to state a cause of action or, in the alternative, as summary judgment for the defendants. The district court accepted all the facts alleged by the plaintiffs and stated that there were "no factual disputes material to this ruling." *In re Insurance Antitrust Litigation*, 723 F. Supp. at 491.

Thereafter the plaintiffs moved to amend, and the district court denied the motion, observing: "The plain fact is that plaintiffs seek to recover on a theory that, as heretofore explained at length, will not stand under the law." *Id.* at 490.

The plaintiffs appeal.

ANALYSIS

Standing

The domestic and foreign reinsurers challenged the plaintiffs' standing to bring an antitrust suit against them. The district court ruled in the plaintiffs' favor. *In re Insurance Antitrust Litigation*, 723 F. Supp. at 482-83. The foreign reinsurer defendants press their position on this appeal.

Standing in the sense challenged depends on whether Congress in the Sherman Act intended to protect the kind of interest asserted by the plaintiffs. *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989). To answer this question we look at the five factors set out in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537-45, 103 S.Ct. 897, 908-12, 74 L.Ed.2d 723 (1983).

First: The Specific Intent of the Alleged Conspirators. The reinsurer defendants are alleged to have intended to restrict the kinds of insurance available to the plaintiffs. This factor favors standing.

Second: The Directness of the Injury. "Directness" in the antitrust context means "close in the chain of causation." *R.C. Dick*, 890 F.2d at 147. Accepting as we must the plaintiffs' allegations as true, there is a close connection between the conduct of the reinsurer defendants, domestic and foreign, and the damages suffered by the plaintiffs. As the district court found, "the direct effect" of the reinsurers' action was "to restrain the availability of desired coverages in the markets in which plaintiffs purchase insurance." *In re Insurance Antitrust Litigation*, 723 F. Supp. at 483. That the action of the reinsurers took effect through the primary insurers does not lessen the directness of these consequences which followed so closely upon the challenged conduct. The injury alleged was direct. This factor favors standing.

Third: The Character of the Damages. According to their claims, plaintiffs suffered by having to pay more for the insurance they wanted. Although the proof may be complex, it would appear that they could prove how much extra they had to pay. In the claims in which the primary insurers are charged together with the reinsurers, all of the defendants would be jointly and severally liable if the charges are true. In the claims in which the reinsurers alone are defendants, there will be a problem of allocating the damages caused by the reinsurers as distinct from the damages caused by the primary insurers, and there is a danger of duplicative recovery. To the extent of this problem and this damage, the character of the damages is against standing; but the net balance as to damages is in favor of standing.

Fourth: The Existence of Other, More Appropriate Plaintiffs. The primary insurers who were denied reinsurance could have brought suit. The theoretical possibility that such entities could have sued must be discounted by the power the allegations attribute to the London reinsurers. The 1400 members of ISO

could not withstand this power. As they caved in to it, they are unlikely to desire to challenge it in court. Consumers of insurance are not subject to this restraint. Realistically, no more appropriate class of plaintiffs exists.

Fifth: The Nature of the Plaintiffs' Claimed Injury. The fifth factor is "of tremendous significance." *R.C. Dick*, 890 F.2d at 148, quoting *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 n. 3 (9th Cir. 1985). For example, a plaintiff who is "neither a competitor nor a consumer" in the relevant market does not suffer "antitrust injury." *R.C. Dick* at 148.

In contrast, plaintiffs here were consumers of CGL insurance. As consumers, they participated in the market said to have been restrained. The antitrust laws are intended to preserve competition. They are intended to preserve competition for the benefit of consumers in the market in which competition occurs. When competition is choked off, it is the consumers who suffer. The plaintiffs here as consumers have alleged antitrust injury.

The Balance. Almost all of the *Associated General Contractors* factors point to the presence of standing against all of the defendants. By not challenging the plaintiffs' standing on this appeal, the defendant primary insurers and the domestic reinsurers concede the presence of the factors that establish standing. The foreign reinsurers have no characteristics that distinguish them from the domestic reinsurers. As the district court determined, the plaintiffs have standing to maintain this antitrust suit against all defendants.

Standing as Parens Patriae

That a state as *parens patriae* may sue to redress a violation of the antitrust laws is well-established. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 450-51, 65 S.Ct. 716, 722-23, 89 L.Ed. 1051 (1945) (conspiracy in violation of antitrust laws is a wrong "of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.") There must, of course, be antitrust injury for an injunction to be granted.

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 109-16, 107 S.Ct. 484, 488-92, 93 L.Ed.2d 427 (1986). Each state here asserts its "quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607, 102 S.Ct. 3260, 3269, 73 L.Ed.2d 995 (1982). That interest makes each state "more than a nominal party." *Id.* The state's interest in preventing harm to its citizens by antitrust violations is, indeed, a prime instance of the interest that the *parens patriae* can vindicate by obtaining damages an/or an injunction. *Id.* at 605, 102 S.Ct. at 3267.

The McCarran-Ferguson Act Defense

The district court dismissed the claims of the plaintiffs because of the McCarran-Ferguson Act immunity of the defendants. We look at the plaintiffs' allegations, accepting them as the district court did as true, to see if McCarran immunity is present.

The McCarran-Ferguson Act provides that no act of Congress "shall be construed to invalidate" any state law enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b) (1988). Two relevant exceptions are added: The Sherman Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." *Id.* Moreover, "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." *Id.* § 1013(b).

For the immunity to apply, therefore, the defendants must be in the business of insurance; that business must be regulated by state law; and the defendants must not have agreed to boycott, coerce, or intimidate or performed an act of boycott, coercion or intimidation.

The Business of Insurance

The district court correctly found that the first condition was met: the defendants are in the business of insurance. Reinsurance and retrocessional insurance are as much the business of insurance as the offering of primary insurance. *In re Insurance Antitrust Litigation*, 723 F. Supp. at 473. Although the plaintiffs made an issue of this question in the district court, they do not seriously argue it on this appeal.

State Regulation

Do the states regulate the conduct complained of here? The district court observed that the complaints filed by the states alleged violation of state law as well as violation of the Sherman Act. The district court concluded that these allegations were "self-defeating." *Id.* at 475. The states had wounded their case mortally by asserting that the defendants were liable to state regulation.

By the same token, it could be observed, the defendants by their McCarran-Ferguson Act defense conceded that their business was subject to regulation by the states, and the foreign defendants thereby undermined their claim that comity barred their being subject to American regulation. The district court recognized that the position of the foreign defendants was inconsistent but did not feel bound to resolve the inconsistency, treating the defendants' pleas as alternatives: they won either because they were subject to state regulation or, because of comity, they were subject to no American regulation. *Id.* at 479.

What is sauce for the goose is sauce for the gander. If defendants are to be read as offering inconsistent alternatives, so are the plaintiffs to be read. Pleading of one alternative does not destroy the foundation of the other alternative. Neither side is trapped by its pleadings.

More fundamentally, established law blocks regulation by one state of the United States of the insurance business outside the borders of that state. A state's regulation of insurance does not have extraterritorial effect within the United States. *See FTC v. Travelers Health Ass'n*, 362 U.S. 293, 298-99, 302, 80 S.Ct. 717, 720-21, 722, 4 L.Ed.2d 724 (1960). The court commented

on the legislative history of the McCarran-Ferguson Act and concluded from H.R.Rep. 143, 79 Cong. 1st Sess. 3, which cited *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832; *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 43 S.Ct. 125, 67 L.Ed. 297; and *Connecticut General Insurance Co. v. Johnson*, 303 U.S. 77, 58 S.Ct. 436, 82 L.Ed. 673 that a state does not have power to regulate in any way contracts of insurance or reinsurance entered into outside its jurisdiction even though the risks covered were risks within the state. *Id.* 362 U.S. at 300-01, 80 S.Ct. at 721-22. The Court summed up the legislative history: "There was no indication of any thought that a State could regulate activities carried on beyond its own borders." *Id.* at 300, 80 S.Ct. at 721.

A fortiori, regulation by the fifty states of foreign reinsurers is beyond the jurisdiction of the states. J. Atwood & K. Brewster, *Antitrust and American Business Abroad* (2d ed. 1981) 1, 78. All of the arguments eloquently put by the London defendants in their objection to the application of the Sherman Act to their business apply fifty times over to the regulation of it by the individual states. State insurance schemes "do not, and could not, purport to regulate the bulk of international insurance transactions." *Id.* Consequently, McCarran-Ferguson Act immunity does not attach to the foreign defendants. By the same token, the claims by the states against the foreign defendants alone under state insurance laws (referencing the fifth, sixth, and eighth California claims) must be dismissed as seeking to exercise extraterritorial jurisdiction.

A different question is presented by the primary insurers, the American reinsurers, and the American insurance brokers, all of whom are subject to regulation by the states and therefore prima facie immune. The question is whether the action of these domestic defendants in combination with the foreign defendants is subject to state regulation. The states argue that it is not. They invoke the principal that "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." *Group Life & Health Inc. Co. v. Royal Drug Co.*, 440 U.S. 205, 231, 99 S.Ct. 1067, 1083, 59 L.Ed.2d 261 (1979). Membership of an

exempt entity in a conspiracy with nonexempt entities makes the exempt entity liable. *Beltz Travel Service, Inc. v. International Air Transport Assoc.*, 620 F.2d 1360, 1366-67 (9th Cir. 1980). The domestic defendants offer no rebuttal to these authorities. We conclude that the domestic defendants' immunity was lost when they conspired with the foreign defendants.

Boycotts

A second, independent ground exists why the McCarran-Ferguson Act defense does not work for any of the defendants. The Sherman Act applies to persons or companies in the insurance business if they agreed to a boycott or engaged in acts of boycott or coercion. The allegations of the plaintiffs, here accepted as true, charge agreements by the defendants to boycott nonconforming insurers and acts of boycott and coercion. No immunity for such agreements and acts exists.

The defendants' position is that they could confer and agree on the terms on which insurance would be offered; the immunity in so doing is incontestable. But they are charged with much more: with agreeing to refuse reinsurance for CGL risks unless ISO amended its 1984 CGL form; with coercing ISO and ISO members to adopt the terms the defendants wanted; with coercing primary insurers to use the claims-made form; with agreeing to exclude from all casualty and property treaty reinsurance written in London all pollution coverage for American risks. The facts underlying these allegations are asserted in some detail, including, the actions of Hartford, CIGNA, Aetna, and Allstate in 1984 in bringing pressure on the ISO staff and other ISO members; the meeting of March 2, 1984 between representative of Hartford and representatives of General Re when they agreed to coerce ISO to accept their demand; the successful effort of General Re with RAA so that on March 26, 1984, RAA created a committee, consisting of five of the defendant domestic reinsurers, to force revision of the ISO forms of CGL insurance; the agreement of this committee on June 15, 1984 to boycott the 1984 forms, followed by a letter from RAA to ISO on June 19, 1984, stating that the members of RAA would not provide

reinsurance for coverages written on the 1984 forms; the enlistment of Thomas Greene to carry this message to ISO, as he did in a speech to the ISO directors on June 21, 1984.

Hartford, Aetna, CIGNA, and Allstate—all according to allegations that here are accepted as the truth—also took the initiative to encourage a boycott of the 1984 ISO forms by the lead underwriters of North American casualty reinsurance at Lloyd's of London and used Thomas Greene and Nick Graham of Carvill to carry the message to the London reinsurance market. As a result of these efforts, the lead underwriters, named as defendants here, met representatives of ISO at the Garrick Club in London on July 4, 1984 and indicated their resolve to eliminate the occurrence form. On September 19, 1984, at a dinner at the Board Room, a private club in New York City, a combination of representatives of the defendant domestic reinsurers and foreign underwriters communicated to ISO members their agreed demands for change. The following day ISO largely capitulated. Agreements to boycott and acts of implementation of the agreements are, in short, explicitly set forth in the complaints.

In the classic case on boycotts in the context of the McCarran-Ferguson Act, *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978), four insurance companies entered into an agreement according to whose terms three of the companies would not sell insurance to doctors in order to force them to accept "new ground rules of coverage set by the fourth." *Id.* at 533, 98 S.Ct. at 2926. The Court found "an organized boycott" to exist, stating: "The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott." *Id.* at 544-45, 98 S.Ct. at 2931. That is exactly what Hartford and the other defendant prime insurers did here, always accepting the plaintiffs' allegations as true: they enlisted the reinsurers to compel capitulation by ISO and the insurers who had refused to go along with the Hartford demands. The London reinsurers did similarly in denying retrocessional coverage on policies covering pollution risks.

Congress, the Court said in *St. Paul*, intended to guard against "the danger that insurance companies might take advantage of purely permissive state legislation to establish monopolies and enter into restrictive agreements falling outside the realm of state-supervised cooperative action." *Id.* at 547, 98 S.Ct. at 2933. The states allege that Hartford and its allies engaged in precisely such conduct and that the reinsurers did the same among themselves.

The Court in *St. Paul* gave prominence to the explanation of the McCarran-Ferguson Act by Senator O'Mahoney, who said the vice in the insurance industry was "a system of private government which had been built up by a small group of insurance companies, which companies undertook by their agreements and understandings to invade the field of Congress to regulate commerce." *Id.* at 548, 98 S.Ct. at 2933. That is precisely what has happened in this case, according to the plaintiffs: the defendants have gone beyond joint action to their own regulation of the terms on which CGL and property insurance will be offered.

The district court, of course, was as familiar with *St. Paul* as this court is, but placed an emphasis that we do not on the Court's statement that the boycotting insurers there would not deal with the doctors "*on any terms*." The district court supplied italics for this phrase which is unemphasized in the Court's opinion. Compare ***In re Insurance Antitrust Litigation***, 723 F. Supp. at 476, with *St. Paul*, 438 U.S. at 552, 98 S.Ct. at 2935. The issue before the Court was whether "boycott" in the McCarran-Ferguson Act meant boycotts directed against policyholders as well as boycotts directed at competitors. *Id.* at 552, 98 S.Ct. at 2935. The Court held the term to include both kinds of boycott. The description of the boycott at issue was not made as a definition excluding from the definition refusals to deal except on the terms demanded. The evil of a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms. So the three malpractice insurers in *St. Paul* used their economic power to force doctors to accept St. Paul's

terms; so here, the defendant reinsurers and London underwriters used their economic power, their refusal to reinsure, to force ISO and its recalcitrant members to accept the terms Hartford and its allies wanted. They, if plaintiffs are correct in their allegations, engaged in a boycott.

The district court limited the term "boycott" in a second way, quoting *Feinstein v. Nettleship Co.*, 714 F.2d 928, 933 (9th Cir. 1983), *cert. denied*, 466 U.S. 972, 104 S.Ct. 2346, 80 L.Ed.2d 820 (1984): "Because [the agreement] in no way limited the doctors' ability to deal with third parties, the agreement itself is not an agreement to boycott. . . ." But this dictum is taken from its context. In *Feinstein* an agreement between a county medical association and an insurance agent led the defendant insurer to provide malpractice insurance only to members of the association. The plaintiff doctors could buy insurance from other insurers and did not contend that they were subject to a boycott; what they objected to was the "inherently coercive" power of the defendants' "monopoly position." *Id.* at 933. We observed that the plaintiffs' objection to monopoly power was an invocation of section 2 of the Sherman Act, and by its terms the McCarran-Ferguson Act gave immunity from this part of the Sherman Act. *Id.* at 933-34. *Feinstein* is patently very different from the case where boycotts are alleged by plaintiffs who say that the defendants conspired to restrict primary insurance by the reinsurers' agreement to a boycott.

Why were the charges of the complaint not as plain to the district court as they appear to be on appeal? Because the district court took the position that the insurers' and reinsurers' agreement on terms was immune and that such agreement "comprehends efforts to seek agreement by others, including those who might be unwilling to agree were it not for economic exigencies." *In re Insurance Antitrust Litigation*, 723 F.Supp. at 478. But when "the economic exigencies" are produced by conspirators who refuse to supply reinsurance if the unwilling insurer does not agree, a boycott is in effect and is being implemented. The defendants are charged with boycotts, and the allegations, taken as true, destroy their McCarran-Ferguson Act immunity.

Excess and Umbrella Insurance. No boycotts are alleged as the defendants' modus operandi in respect to these branches of insurance. The states say that they are parts of the insurance business unregulated by the states and so not immune under McCarran. The district court held to the contrary, finding that all of the relevant states had statutes "broad enough to apply to any persons in the business of insurance." *In re Insurance Antitrust Litigation*, 723 F. Supp. at 474.

The domestic sellers of excess and umbrella insurance were, as the district court held, exempt. But they engaged in agreements – so it is stated – with the non-exempt Lloyd's underwriters, Merrett and Three Quays. Their own exemption was lost by acting in concert with non-exempt parties. *Group Life and Health Ins. Co.*, 440 U.S. at 231, 99 S.Ct. at 1083.

The State Action Defense

If the states have no regulatory authority over the foreign entities and if combination with the latter forfeits the immunity of the domestic companies, a third line of argument advanced by some defendants works even less well for them. These defendants, referring to those states whose regulatory agencies approved the revised ISO form, contend that there was not only state regulation but state action, and that therefore they have immunity under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The relevant states, they argue, had a clearly articulated policy to displace competition with regulation when they permitted "the collective development" of insurance policy forms and actively supervised the contents of the forms. The action by the states, they assert, insulates them under *Parker* entirely apart from their *McCarran* exemption.

Their argument fails because nothing in the affidavit evidence submitted by the defendants shows that the relevant states supervised or approved the boycotts used to produce agreement on the forms. The plaintiffs, the defendants object, produced no

evidence countering their evidence. The plaintiffs did not need to do so: the defendants had made no showing of state action endorsing the boycotts.

The defendants are in the same position as the defendants in *St. Paul*: the policy changes desired by St. Paul were assumed by the court to have been filed with the state insurance director. The Court observed that there was no suggestion that Rhode Island, "in furtherance of its regulatory policies, authorized the concerted refusal to deal on any terms with St. Paul's policyholders." *St. Paul* 438 U.S. at 554 n. 26, 98 S.Ct. at 2936 n. 26. We have adopted the same distinction: state approval of one activity is not state approval of a related but distinct activity. *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187 (9th Cir. 1988). The alleged anticompetitive conduct in the present case, as in *Medic Air Corp.*, was neither a reasonable nor necessary consequence of the conduct regulated and approved by the state. *Id.* at 1189. The agreements to refuse to reinsure were not state action.

The Connecticut Claim of a General Conspiracy. The London reinsurers challenged the claim in the Connecticut complaint that included both casualty and property insurance and the reinsurance and retrocessional insurance connected therewith. The district court observed that property insurance had not been alleged to have connection with CGL insurance or with the market in which CGL insurance is sold. The district court thereupon granted the motion to dismiss this claim. *In re Insurance Antitrust Litigation*, 723 F. Supp. at 484.

The district court rightly objected to a defect in this claim. The plaintiffs moved to amend. The district court denied the motion. The defendants say the motion was too late. But the district court did not deny amendment because the plaintiffs moved too late. It denied amendment because the plaintiffs' entire theory "will not stand under the law." *In re Insurance Antitrust Litigation*, 723 F. Supp. at 490. We are free to review this legal conclusion de novo. It is not consistent with this opinion. The plaintiffs' basic theory is maintainable. On remand

of the case to the district court, the plaintiffs should be afforded the opportunity to amend.

Comity

A statute enacted in 1989 declares that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a (the FTAIA). But the statute immediately adds, "unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect (A) on trade or commerce which is not trade or commerce with foreign nations. . . ." *Id.* The defendants contended in the district court that the FTAIA barred the plaintiffs because the conduct complained of in the London reinsurance claims related to commerce that was "wholly foreign commerce." The district court rejected this argument, holding as follows: "The subject matter of the alleged agreement, however, concerned the provision of reinsurance within the United States, and the allegations of effects in United States markets are sufficient to preclude a characterization of wholly foreign commerce." *In re Insurance Antitrust Litigation*, 723 F. Supp. at 486. By finding "the effects" sufficient to preclude application of the statute, the district court implicitly found that their impact on the commerce of the United States met the statutory standard of being "direct, substantial and reasonably foreseeable."

On appeal, the London reinsurers devote a single sentence in a single footnote to restating their view that the FTAIA bars the claims directed at conduct within the London reinsurance market. These defendants offer neither evidence nor authority to provide a basis for overturning the district court's holding. We reaffirm its conclusion that the FTAIA is no bar to any of the plaintiffs' claims.

The district court, however, found that international comity forbade its exercise of its jurisdiction over the British defendants. The district court acknowledged that as to this issue its application of the FTAIA might be argued to be decisive. *Id.* at 486,

n. 28. But there were no court decisions so holding. The House Report on this legislation stated that it had "no effect on the courts' ability to employ notions of comity." H.R. Rep. No. 97-686 at 13 (1982), *reprinted in 1982 U.S. Code Cong. & Admin. News* at 2431, 2498. The district court prudently concluded that it should apply the analysis of comity set out in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (*Timberlane I*).

On appeal, the plaintiffs renew their argument: the Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a, is dispositive. The defendants do not reply to their argument but by implication of their insistence on *Timberlane* do not concede. We strike a middle position. We do not believe a *Timberlane* analysis (*see infra*) can be unaffected by the statute. If a complaint survives the new bar of 15 U.S.C. § 6a because the conduct has "a direct, substantial, and reasonable foreseeable effect" on American commerce, it is only in an unusual case that comity will require abstention from the exercise of jurisdiction. But as the legislation does not eliminate comity, a court should look to see if the case before it is one in which comity still has a role to play.

Timberlane I was an opinion of this court written by Judge Herbert Choy which "has commanded a wide following." Atwood & Brewster, *Antitrust and American Business Abroad* 1, 162-63. As an advance upon Judge Learned Hand's exposition of the law of extraterritorial application of American antitrust law in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945), *Timberlane* was "a major development." Atwood & Brewster, 1, 163. Rejecting the simple test of the effect of the charged conduct upon American commerce, *Timberlane* adopted "a jurisdictional rule of reason." *Timberlane I*, 549 F.2d at 613. We were to "weigh" and to "balance" the various considerations—the two metaphors indicated that a court should examine each relevant factor, assign its relative importance, and come to a conclusion by comparing the relative importance of the elements involved. We now conduct this examination and evaluation in terms of the factors enumerated by *Timberlane*.

First: The Degree of Conflict With Foreign Law or Policy. The government of the United Kingdom has filed a brief as amicus on this appeal. That brief informs us that the Lloyd's Acts 1871-1982 provide detailed regulation of the Society of Lloyd's. The regulation is supplemented by the Insurance Companies Act of 1982, which applies to most insurance companies as well. The Restrictive Trade Practice (Services) Order exempts certain insurance services from the Restrictive Trade Practices Act of 1976. See *In re Insurance Antitrust Litigation*, 723 F. Supp. at 488. The district court found that application of the antitrust laws to the London reinsurance market "would lead to significant conflict with English law and policy." *Id.* at 489. The British brief reiterates that conclusion; we do not doubt its accuracy. Such a conflict, unless outweighed by other factors, would by itself be reason to decline exercise of jurisdiction. *Timberlane Lumber Co. v. Bank of America*, 749 F.2d 1378, 1384 (9th Cir. 1984) (*Timberlane II*), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985).

Second: The Nationality or Allegiance of the Parties and the Locations or Principal Places of Business of the Corporations. All of the plaintiffs are located in the United States. There is a substantial American interest in hearing their case. That interest is increased because nineteen of the plaintiffs are themselves states of the United States. The defendants named in certain counts are English or located in England. The district court found that "many of the corporate defendants," including those located in England, "are subsidiaries of American corporations and may be influenced by the allegiance of their American parents." *In re Insurance Antitrust Litigation*, 723 F. Supp. at 489. The interests of Britain are at least diminished where the parties are subsidiaries of American corporations. *United States v. Vetco, Inc.*, 691 F.2d 1281, 1289 (9th Cir.), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981). Moreover, although some counts of the complaints have named only the English reinsurers as defendants, other counts charge them as coconspirators with American insurers. As to these counts, the interest of an American court in being able to judge claims against an American company is high. It would not make much

sense to dismiss the London defendants on some counts and hold them answerable on others. On balance, the presence of the American plaintiffs, many American defendants and some American subsidiaries is a factor pointing towards the exercise of jurisdiction.

Third: The Extent to Which Enforcement by Either State Can Be Expected to Achieve Compliance. It would be unrealistic to expect a British court to enforce an American court's injunction against Lloyd's. It would not be unrealistic to expect an American court to be able to obtain compliance with its orders by the subsidiary of an American parent and to be able to affect the way the foreign defendants conducted themselves in the United States. Damages, if awarded, could be collected from assets of the foreign defendants within the United States. The decree of an American court setting out the obligations of the American insurers would undoubtedly be effective and surely would have an impact on the way the American insurers did business with the foreign defendants. Substantial compliance, in short, could be achieved. This factor is in favor of the exercise of jurisdiction.

Fourth: The Relative Significance of Effects on the United States as Compared With Those Elsewhere. The comparison led to the ultimate dismissal of the Timberlane suit in Timberlane II: the effects of the conduct charged were substantial in Honduras and minimal in the United States. *Timberlane II*, 749 F.2d at 1385. The case here is just the reverse. The effects are minimal, or at any rate not large in England, and they are, as implicitly found by the district court, "direct, substantial, and reasonably foreseeable" in the United States, as to which Lloyd's does at least half of its casualty underwriting. Accepting as true the plaintiffs' allegations, the actions of the foreign defendants has had the kind of "real economic consequences" for the American economy that strongly weigh in favor of the exercise of jurisdiction. *See* Atwood and Brewster, 1, 169.

Fifth: The Extent to Which There is Explicit Purpose to Harm or Affect United States Commerce. The purpose of the

agreements to boycott was to affect the insurance business in the United States. The district court thought that the purpose was "the legitimate business purpose" of reducing the defendants' exposure to certain kinds of risks. *In re Insurance Anti-trust Litigation*, 723 F. Supp. at 490. Both purposes existed. But in applying the jurisdiction test it is the purpose to affect American commerce that is more important. The compliance of the charged conduct with the law of the foreign jurisdiction has already been taken into account under the first factor. The fifth factor depends on the relation of the conduct to the United States: was it intended to have effects here? The answer in this case must be yes. So the complaints charge. The fifth factor strongly weighs in favor of the exercise of jurisdiction.

Sixth: The Foreseeability of the Effects on American Commerce. The district court concluded that the defendants conceded that the effects were foreseeable. *Id.* As intended, the effects were, of course, foreseeable. As they were substantial, their foreseeability becomes a strong factor favoring the exercise of jurisdiction.

The Balance. A single factor points toward abstention: the conflict with a long-established British policy towards a venerable British trade, the underwriting of insurance. Every other factor—nationality, likelihood of compliance, the significance of the effects on American commerce, their foreseeability and their purposefulness—points to the appropriateness of exercising jurisdiction. Unless we were to create a kind of analogue of the McCarran-Ferguson Act for insurance business regulated by a foreign country and treat Lloyd's as immune, the district court should exercise jurisdiction. No authority warrants us in creating a special immunity for insurance regulated by Britain. Comity does not require it. Nothing overcomes the weight of the findings already made under the Foreign Trade Antitrust Improvements Act. The comity factors of *Timberlane* indicate that the court's jurisdiction of the subject matter that exists must be exercised.

REVERSED and REMANDED.

Opinion of the Northern District of California

In re INSURANCE ANTITRUST LITIGATION

No. MDL 767.

United States District Court, N.D. California.

Oct. 10, 1989.

REVISED MEMORANDUM OF DECISION AND ORDER

SCHWARZER, District Judge.

I. INTRODUCTION

Nineteen states and numerous private plaintiffs have brought actions against a group of insurance companies, reinsurance companies, underwriters, brokers and individuals, and the Insurance Services Office, Inc. ("ISO"), charging them with violations of the federal antitrust laws and state laws.[1] The charges rest on alleged conspiracies, boycotts, threats, intimidation, and other coercive conduct by defendants to restrict the availability of certain coverage under policies for commercial general liability insurance ("CGL") and property insurance. The filing of these complaints followed lengthy investigations conducted by the regulatory agencies of several states.[2]

Defendants have moved to dismiss, for judgment on the pleadings, and for summary judgment, and plaintiffs have made cross-motions. For purposes of these motions, the well-pleaded allegations of the complaints are accepted as true, and any factual disputes and inferences are resolved in plaintiffs' favor.

Copies of the Court's proposed ruling were distributed to counsel well in advance of the hearing, and the Court has considered the arguments of counsel in reaching the decision reflected in this memorandum.

II. FACTUAL BACKGROUND

CGL insurance protects the insured against the risk of liability to third parties for bodily injury or property damage. It is purchased by businesses, non-profit groups, and governmental

[1] For a list of the parties and of the actions encompassed by this ruling, see Appendix.

[2] Moreover, under the Court's pretrial order, the parties were free to conduct discovery insofar as necessary for these motions.

entities. Defendants Hartford Fire Insurance Company ("Hartford"), Allstate Insurance Company ("Allstate"), Aetna Casualty and Surety Company ("Aetna"), and CIGNA Corporation ("CIGNA") are primary insurers who are major providers of CGL insurance.[3] CGL insurance is written predominantly on standard policy forms developed by ISO.

ISO is an association of more than one thousand property or casualty insurers, including Hartford, Allstate, Aetna, and CIGNA. It is licensed as a rating, rate service, and advisory organization in all fifty states. One of its primary functions is to develop standardized policy forms for property and casualty insurance that comply with state regulations and will be accepted by state insurance departments. On behalf of its members, ISO files standardized policy forms with state insurance departments. ISO also collects historical loss data, projects future loss trends, and calculates advisory rates for insurance.

In the late 1970s, ISO began to develop a revision of the standard CGL form then in use. In 1984, ISO filed or lodged with state insurance departments two proposed new policy forms for CGL insurance. These forms substantially modified coverage previously available to the insured. One of the forms was a "claims-made" policy under which coverage was limited to claims made during the policy period regardless of when the occurrence out of which the claim arose had taken place. This represented a reduction in the coverage available under the previous CGL policy form which was an "occurrence-based" form; under that form, the insured was covered for claims arising out of occurrences during the policy period, no matter when asserted, thus exposing insurers to so-called "long tail risks" that could arise long after the policy period. The proposed claims-made form reduced that exposure and shifted the risk of future claims to the insured. The other proposed form was a modified occurrence policy.

[3] CIGNA is a holding company having subsidiaries which are primary insurers.

These forms became the subject of widespread debate and controversy in the insurance industry. Considerable differences of opinion arose over what should trigger coverage, whether retroactivity of claims-made coverage should be limited, whether the pollution exclusion should be modified, and whether defense costs should be limited by the policy limits.

In their complaint, plaintiffs charged defendants Hartford, CIGNA, Allstate, and Aetna with engaging in a concerted effort to block adoption of the 1984 forms because those forms did not restrict coverage sufficiently. Plaintiffs allege that these defendants entered into conspiracies with certain domestic and foreign defendant reinsurance companies, underwriters, and their representatives to "boycott" the 1984 forms unless a retroactive date was added to the claims-made form and a pollution exclusion and defense cost cap were added to both forms. Plaintiffs allege that as a result of the efforts of Hartford, Allstate, Aetna and CIGNA, certain domestic and London reinsurers threatened to "boycott" North American CGL risks unless these changes were made in the claims-made form and the occurrence form was eliminated. Also as a result of these efforts, the ISO executive committee in September 1984 voted to include a retroactive cut-off date in the claims-made policy form, to exclude pollution coverage from both forms, but to defer until later limiting defense costs, and to offer an occurrence form along with the new claims-made form.

Following this agreement, ISO, Hartford, Aetna, and representatives of the London reinsurers undertook joint efforts to promote the new forms. Reinsurers refused to accept new reinsurance business or renew old business unless the primary carrier agreed to switch to the claims-made form when available. Reinsurers also imposed "sunset dates" in their treaties limiting their exposure to losses on occurrence policies. Reinsurance underwriters also entered into an agreement to exclude pollution liability coverage from reinsurance treaties.

During the period from 1984 through 1986, when these events are alleged to have occurred, ISO lodged or filed the proposed forms with the insurance departments of all states. Departments

in thirty-five states held public hearings and the policy terms that are the subjects of the complaints were discussed within the industry and in public forums. As a result ISO filed or lodged several revisions of its proposed forms with the state insurance departments. At the conclusion of the various states' proceedings in 1986, all of the plaintiff states and the two non-plaintiff states in which individual plaintiffs reside had approved the ISO forms with the following exceptions: Massachusetts and New Jersey disapproved them, New York approved only the occurrence form, and California and Colorado, having no procedure for approval, took no action. Thereafter ISO withdrew its data collection and risk estimation support for the pre-1984 CGL form.

In 1986, ISO and certain defendants agreed that ISO should also develop standard CGL umbrella and excess policy language. In June 1986 ISO released policy language providing for a retroactive date on claims-made policies, a pollution exclusion and defense costs within policy limits.

Finally, in 1987 domestic and London retrocessional reinsurers[4] are alleged to have entered into an agreement regarding property insurance to use their "best endeavors to ensure that all U.S.A. and Canadian exposed [property] insurance/reinsurance business attaching on or after 1st January, 1987 will only be written where the original business includes a seepage and pollution exclusion wherever legal and applicable."

III. THE FEDERAL LAW VIOLATIONS CHARGED

The state complaints fall into two groups depending on when they were filed. The First Wave Complaints each contain eight federal claims.[5] The Second Wave Complaints each contain six

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[4] Retrocessional insurance is insurance for reinsurers.

[5] First Wave Complaints were filed by Alabama, Arizona, California, Massachusetts, New York, West Virginia, and Wisconsin. Citations to First Wave Complaints are to the California complaint.

federal claims.[6] All complaints also contain pendent state law claims. The private complaints track the state complaints.

The First Claim of the Second Wave Complaints alleges a global conspiracy by all defendants in violation of Section One of the Sherman Act, 15 U.S.C. § 1,

> for the purpose and with the effect of shrinking the scope of CGL property/casualty insurance and reinsurance and retrocessional insurance, . . . to . . . reduce financial exposure to such risks and to increase underwriting profits therefrom.

(Conn.Compl't ¶ 117.) Plaintiffs allege that defendants used boycotts, coercion, and intimidation to limit available coverage. (*Id.* ¶ 118(a).) No corresponding claim is made in the First Wave Complaints.

The Second Claim of the Second Wave Complaints and the First through Fourth Claims of the First Wave Complaints allege a conspiracy by defendants Hartford, Allstate, Aetna, CIGNA, ISO, and certain others[7] to manipulate the ISO design process

[6] Second Wave Complaints were filed by Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Minnesota, Montana, New Jersey, Ohio, Pennsylvania, and Washington. Citations to Second Wave Complaints are to the Connecticut complaint.

[7] The defendants named in these claims are as follows:

The Second Claim of the Second Wave Complaints alleges that defendants Robin A.G. Jackson, Merrett Syndicate, Three Quays, Janson Green, Edwards & Payne, C.J.W., Thomas A. Greene, R.K. Carvill, RAA, General Re, Constitution Re, Mercantile & General Re, Prudential Re, North American Re, and Winterthur Swiss and other co-conspirators were involved. Louisiana also names INA.

The First Claim of First Wave Complaints alleges concerted action by domestic defendants and also names RAA, General Re, Constitution Re, Prudential Re, North American Re, Winterthur Swiss, and Thomas A. Greene.

(Footnote continued)

for CGL forms to limit the available coverage. Plaintiffs allege that defendants conspired to restrict the terms under which reinsurance coverage would be provided for CGL risks, to refuse to provide reinsurance unless the 1984 form were amended to incorporate defendants' terms, to coerce ISO and its members to adopt the coverage terms and exclusions agreed to by defendants, and to boycott the forms unless amended. (Conn.Compl't ¶¶ 122-123; Cal.Compl't ¶¶ 113-114, 118-119, 123-124, 128-129.)

The Third Claim of the Second Wave Complaints and the Fifth Claim of the First Wave Complaints in substance charge certain defendants[8] engaged in the reinsurance business at Lloyd's of London with a conspiracy to restrict the terms under which reinsurance coverage would be provided for CGL risks and to refuse to reinsure CGL risks on occurrence forms by coercion and intimidation of primary insurers, among other things. (Conn.Compl't ¶¶ 127-128; Cal.Compl't ¶¶ 133-134.)

The Fourth Claim of the Second Wave Complaints and the Sixth Claim of the First Wave Complaints in substance charge certain defendants[9] engaged in the reinsurance business at

The Second Claim of the First Wave Complaints alleges concerted action by foreign defendants also names Robin A.G. Jackson, Merrett Syndicate, Three Quays, Janson Greene, Edwards & Payne, C.J.W., J. Brian Hose, R.K. Carvill, and Thomas A. Greene. New York and Wisconsin do not name J. Brian Hose; Arizona does not name Robin A.G. Jackson.

The Third Claim of the First Wave Complaints alleges concerted action by domestic and foreign defendants and names the same defendants as in the First and Second Claims except for C.J.W. and J. Brian Hose.

The Fourth Claim of the First Wave Complaints alleges concerted action by domestic and foreign defendants and ISO and names the same defendants as in the Third Claim.

[8] Peter N. Miller, Robin A.G. Jackons, Merrett Syndicate, Three Quays, Janson Greene, Edwards & Payne, and Ballantyne McKean. Arizona does not name Peter N. Miller or Robin A.G. Jackson.

[9] Merrett Syndicate, Murray Lawrence, Edwards & Payne, D.P. Mann, C.J.W., Unionamerica, Terra Nova, Oxford, CNA Re, and Ballantyne McKean. Wisconsin does not name CNA Re and does name Robin A.G. Jackson.

Lloyd's of London with a conspiracy to restrict the terms under which casualty reinsurance coverage would be provided for CGL risks and to limit the availability of pollution coverage in primary casualty insurance. No boycott, coercion, or intimidation is alleged. (Conn.Compl't ¶¶ 132-133; Cal.Compl't ¶¶ 138-139.)

The Fifth Claim of the Second Wave Complaints and the Eight Claim of the First Wave Complaints in substance charge certain defendants[10] engaged in the reinsurance business at Lloyd's of London with a conspiracy to restrict the terms on which property insurance and reinsurance coverage would be provided and to limit its availability by, among other things, agreeing to boycott the provision of retrocessional insurance unless the primary insurance excluded seepage, pollution, and contamination coverage. (Conn.Compl't ¶¶ 137-138; Cal.Compl't ¶¶ 148-149.)

The Sixth Claim of the Second Wave Complaints and the Seventh Claim of the First Wave Complaints charge ISO, Allstate, Hartford, Aetna, and certain other defendants[11] with a conspiracy to restrict terms and conditions under which umbrella and excess insurance would be available. No boycott, coercion, or intimidation is charged. (Conn.Compl't ¶¶ 142-143; Cal.Compl't ¶¶ 143-144.)

IV. THE MOTIONS BEFORE THE COURT

Defendants have filed five motions to dismiss or for summary judgment on the following grounds:

A. Asserting antitrust immunity under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 ("the McCarran Act"), all defendants have moved under Federal Rules of Civil Procedure 12(b)(6) and 56 to dismiss or for summary judgment.

[10] Unionamerica, Terra Nova, Excess, Edwards & Payne, Kemper Re, Merrett Syndicate, and Continental Re. Oxford is named only in all the Second Wave Complaints except Alaska's. Wisconsin also names CNA Re.

[11] Merrett Syndicate and Three Quays. CIGNA is named only in the Second Wave Complaints. Louisiana also names INA.

B. Asserting the state action immunity doctrine, all defendants have moved under Rule 56 for summary judgment against all plaintiffs except California, Alaska, Colorado, and Montana on (a) the so-called global conspiracy claim of the Second Wave complaints, and (b) the policy form development claims.

C. Asserting lack of standing, all defendants except ISO, INA, Hartford, Allstate, Aetna, and CIGNA have moved under Rule 12(b)(6) for dismissal of all claims against them. (This motion does not encompass the claims against Merrett and Three Quays alleging an agreement in restraint of trade in the excess and umbrella insurance market.)

D. Asserting that there is "no factual allegation linking [them] in a 'global' conspiracy," foreign reinsurer defendants have moved under Rule 12(b)(6) to dismiss the global conspiracy claim of the Second Wave complaints.

E. Asserting lack of subject matter jurisdiction and international comity, foreign reinsurer and retrocessional reinsurer defendants and one broker have moved under Rule 12(b)(1) to dismiss the two claims alleging conspiracies to eliminate pollution coverage.

The States have moved to strike the defense based on the state action immunity doctrine.

V. DISCUSSION

A. THE McCARRAN-FERGUSON ACT DEFENSE

Defendants have moved for summary judgment on all federal claims on the ground that their conduct is immunized from antitrust liability by the McCarran Act. Although the primary thrust of the motion is said to be directed at those claims which are based on policy form development activities, the controlling principles apply to defendants' underwriting-related actions as well.[12] Stripped of their pejorative allegations, those claims

[12] Those defendants who are named in claims asserting conspiracies in connection with the reinsurance markets have also moved to dismiss on other grounds. They join in this motion as an alternate ground for dismissal. *See infra* § V.C.

charge a conspiracy to reduce the exposure of defendant insurers and reinsurers under CGL policies. The defendants sought to accomplish their objective by bringing about changes in standard policy language and by avoiding underwriting or reinsuring risks written on disfavored policy terms. All of this they did in large part by collective action, and it may be assumed that plaintiffs could prove a consequent lessening of competition among defendants and a diminution of options available in the market for CGL insurance, resulting in a restraint of trade.

In the absence of the McCarran Act, those allegations may well state a claim for relief under the Sherman Act. The issue raised by these motions is whether plaintiffs could prove a set of facts under those general allegations that would entitle them to relief notwithstanding the McCarran Act.

That Act states:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . .: Provided, That . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012.

Section 1013(b) of the Act further provides:

> Nothing contained in this chapter shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

The McCarran Act created limited antitrust immunity for the business of insurance following the Supreme Court's departure, in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), from prior holdings that insurance is not a transaction in interstate commerce. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538-39, 98 S.Ct. 2923, 2928-29, 57 L.Ed.2d 932 (1978). It was passed in response to widespread concern that the states should not be precluded from continuing to regulate and tax the insurance industry. It immunizes the business of insurance from the antitrust laws but only to the extent that it is regulated by the states and does not involve boycott, coercion, or intimidation. *See Feinstein v. Nettleship Co.*, 714 F.2d 928, 931 (9th Cir. 1983), *cert. denied*, 466 U.S. 972, 104 S.Ct. 2346, 80 L.Ed.2d 820 (1984). Like all antitrust immunities, it must, of course, be narrowly construed. *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231, 99 S.Ct. 1067, 1083, 59 L.Ed.2d 261 (1979).

The application of the McCarran Act immunity involves a three step analysis:

(1) Whether the conduct is within the scope of the business of insurance;

(2) Whether that business is regulated by the states; and

(3) Whether the conduct involves boycott, coercion, or intimidation.

(1) *The Business of Insurance*

In *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982), the Supreme Court stated the criteria for what constitutes the business of insurance for purposes of the McCarran Act as follows:

> *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*,

> whether the practice is limited to entities within the insurance industry.

458 U.S. at 129, 102 S.Ct. at 3009.

And in *Group Life & Health Insurance v. Royal Drug Co.*, the Court said:

> References to the meaning of the "business of insurance" in the legislative history of the McCarran-Ferguson Act strongly suggest that Congress understood the business of insurance to be the underwriting and spreading of risk. Thus, one of the early House Reports stated: "The theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors."

440 U.S. at 220-21, 99 S.Ct. at 1078 (citation omitted).

Plaintiffs do not dispute that the activities of defendants insofar as they relate to the terms and conditions of primary, excess, or umbrella insurance, are the business of insurance within the meaning of the McCarran Act. (*See* Plaintiff States' Unified Opposition Brief ("Unified Opp.") 37-40.) They contend, however, that reinsurance is not the business of insurance because it relates only indirectly to the spreading of policyholder's risk and because, they contend, it is not an integral part of the policy relationship between the insurer and the insured. (*Id.*)

There is no authority for excluding reinsurance from the business of insurance. On the contrary, reinsurance was specifically referred to as part of the business of insurance in the legislative history of the McCarran Act. *See* 90 Cong. Rec. A4406 (1944); 89 Cong. Rec. 6528 (1943). The Ninth Circuit applied the McCarran exemption to reinsurers as well as to the primary insurer in *Feinstein*. 714 F.2d at 930.

Plaintiffs urge an unreasonably narrow application of the *Pireno* test. Their own description establishes that reinsurance is an integral and vital part of the business of insurance. The complaints define reinsurance as "insurance for insurers." (*E.g.*, Conn.Compl't ¶ 4(p); Cal.Compl't ¶ 4(o).) They go on to describe reinsurance as

> a transaction whereby one insurance company, the reinsurer, agrees to indemnify another insurance company, the primary (or "ceding") insurer, for a designated portion of the insurance risks underwritten by the primary insurer. Reinsurance protects the primary insurer from catastrophic losses, and is heavily relied upon by prudent primary insurers. It also allows the primary insurer to sell more insurance than its own financial capacity might otherwise permit. Thus, the availability of reinsurance affects the ability and willingness of primary reinsurers to provide insurance to their customers.

(Conn.Compl't ¶ 4(p); *see also* Cal.Compl't ¶¶ 26-29, 34.)

Thus, reinsurance is no less a part of the process of underwriting and spreading risks than primary insurance. Plaintiff's allegations rest, moreover, on the premise that the terms on which reinsurance is available affect the terms on which primary insurance is written and that the terms and availability of reinsurance directly affect the availability of insurance coverage to consumers. (Unified Opp. 13-16.) As plaintiffs' brief puts it, "by conspiracy to eliminate reinsurance for the consumer-demanded coverages, the reinsurers acted anticompetitively in reinsurance markets . . . [which] led inexorably to an injury to the States in the interrelated primary insurance markets." (*Id.* at 76.) Because reinsurance is thus an element of the policy relationship with the insured, it is part of the business of insurance. *See also SEC v. National Sec., Inc.*, 393 U.S. 453, 460, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1960) (business of insurance includes "activities of insurance companies [that] relate . . . closely to their status as reliable insurers").

By the same logic, retrocessional insurance, which is "insurance for reinsurers" (Conn.Compl't ¶ 4(r)) is part of the business of insurance.[13]

(2) *Regulation by the States*

The condition of state regulation is satisfied by "a state regulatory scheme possess[ing] jurisdiction over the challenged practice." *Feinstein*, 714 F.2d at 933. "It is not necessary to point to a state statute which gives express approval to a particular practice." *Id.*; *see Klamath Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1287 (9th Cir.), *cert. denied*, 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983); *Dexter v. Equitable Life Assur. Soc.*, 527 F.2d 233, 236 (2d Cir. 1975); *Lawyers Title Co. of Mo. v. St. Paul Title Ins. Co.*, 526 F.2d 795, 797-98 (8th Cir. 1975); *Ohio AFL-CIO v. Insurance Rating Bd.*, 451 F.2d 1178, 1181-84 (6th Cir. 1971), *cert. denied*, 409 U.S. 917, 93 S.Ct. 215, 34 L.Ed.2d 180 (1972); *see also* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 210.1b (Supp. 1988) (McCarran immunity distinguished from *Parker v. Brown* immunity; the former requiring only the existence of a state regulatory scheme, without regard to the intensity of state regulation).

This case involves the insurance business in twenty-one states.[14] The Ninth Circuit has held that California's scheme of regulation satisfies the McCarran Act. *Addrisi V. Equitable Assur. Soc. of the United States*, 503 F.2d 725, 728 (9th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S.Ct. 1129, 43 L.Ed.2d 400 (1975). The Court takes judicial notice of the laws of the other jurisdictions.[15] Each state has an insurance department with jurisdiction over

[13] The argument that the exemption is lost as a result of joint action with non-exempt entities is without merit. *Klamath-Lake Pharmaceutical Association v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1288 n. 12 (9th Cir.), *cert. denied*, 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983).

[14] The nineteen plaintiff states plus Florida and Illinois, the two non-plaintiff states in which private plaintiffs reside.

[15] See Defendants' State-by-State Appendix accompanying their McCarran Act motion. The facts set forth in this paragraph have not been disputed in plaintiffs' opposition brief.

policy forms. Sixteen of the plaintiff states and the two nonplaintiff states in which private plaintiffs reside require filing and review of policy forms, including umbrella and excess policies offered by admitted insurers. All of the states have licensed ISO and permit joint action by ISO and insurance companies with respect to policy forms. All of the states have unfair insurance trade practice statutes enabling them to proceed against conduct such as that alleged in the complaints. Although plaintiffs contend that reinsurance and umbrella and excess insurance are not regulated by the states, these statutes are broad enough to apply to any persons in the business of insurance, including reinsurers.[16] These statutory schemes are sufficient to qualify under section 1012(b) of the McCarran Act. *See SEC v. National Securities, Inc.*, 393 U.S. 453, 459-60, 89 S.Ct. 564, 568-69, 21 L.Ed.2d 668 (1969) (state laws protecting or regulating, directly or indirectly, relationship between insurer and policy holder qualify); *FTC v. National Cas. Co.*, 357 U.S. 560, 564-65, 78 S.Ct. 1260, 1262, 2 L.Ed.2d 1540 (1958) (state unfair insurance advertising laws qualify); *Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 421 (4th Cir. 1984) (state unfair insurance practice laws that provide for administrative supervision and enforcement qualify).

Plaintiffs' argument that the regulatory schemes of the states do not reach the allegations of subversion of ISO's decision-making process and concerted activity to restrict the availability of coverages in the market is self-defeating. To avoid McCarran Act immunity, plaintiffs rely on allegations of boycott, coercion, and intimidation, and contend that this conduct is prohibited by the states. That prohibition is indeed contained in

[16] Cal. Insur. Code § 790.01 is typical:

> This article applies to reciprocal and interinsurance exchanges. Lloyds insurers, fraternal benefit societies, fraternal fire insurers, grants and annuities societies, insurers holding certificates of exemptions, motor clubs, nonprofit hospital associations, agents, brokers, solicitors, surplus line brokers and special lines surplus line brokers as well *as all other persons engaged in the business of insurance.*

(Emphasis added.)

the unfair practice acts of each state, but the fact that it is satisfies the regulation prerequisite to immunity under section 1012.[17] *See In re Workers' Comp. Ins. Antitrust Litig.*, 867 F.2d 1552, 1558-60 (8th Cir.), *cert. denied*, __ U.S. __, 109 S.Ct. 3247, 106 L.Ed.2d 593 (1989).

Plaintiffs' argument that the standards for state action immunity under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), should apply to the McCarran Act lacks any support. As Professors Areeda and Hovenkamp point out, if the regulatory requirements under McCarran "were to coalesce with the *Parker* requirements, the scope of the McCarran-Ferguson Act would be largely irrelevant as a practical matter." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 210.1b, at 97 (Supp. 1988). *See infra* § *V.B(1)*.) Such an interpretation would tend to nullify Congressional intent in adopting the McCarran Act.

(3) *The Exclusion of Boycott, Coercion, and Intimidation*

The States have submitted a Statement of Material Facts in support of their unified opposition brief. (Unified Opp. 6-16.) The following facts are material to this section of the opinion.

Twenty of the defendants, including primary insurers, reinsurers, brokers, and underwriters, dissatisfied with the CGL forms approved by ISO in 1984 because those forms failed to eliminate occurrence and pollution coverage, "agreed to and undertook a course of concerted action" to limit the availability of certain CGL coverages, and twelve other defendants ultimately joined in. (*Id.* at 10-11.) This course of action included the following activities. To coerce ISO into revising its 1984 CGL forms, defendant reinsurers agreed to and did announce that reinsurance would not be provided for coverage written on the 1984 form. (*Id.* at 11.) In addition, certain defendants took "coercive action" by agreeing to announce and announcing that they

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[17] Cal. Insur. Code § 790.03(c) is typical:

> Entering into any agreement to commit, or by any concrete action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

would not provide reinsurance on occurrence policies and would impose sunset clauses in their coverage.[18] (*Id.* at 12.) Certain defendants took "coercive action" by agreeing to include and including a pollution exclusion in their reinsurance treaties. (*Id.* at 13-14.) Certain defendants made a "coercive statement of intention not to provide reinsurance unless the primary policy excludes all property pollution coverage." (*Id.* at 14-15).) Finally, certain defendants agreed to eliminate the same coverage from excess and umbrella policy forms. (*Id.* at 15-16.) And ISO withdrew statistical support for its 1973 form. (*Id.* at 12.)

It will be noted that plaintiffs' statement does not allege a boycott. Nor does it (or the complaints) describe conduct that "accords with the common understanding of a boycott." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 552, 98 S.Ct. 2923, 2935, 57 L.Ed.2d 932 (1978). As the Supreme Court described the conduct there in issue,

> The four insurance companies that control the market in medical malpractice insurance are alleged to have agreed that three of the four *would not deal on any terms with the policyholders* of the fourth. As a means of ensuring policyholder submission to new, restrictive ground rules of coverage, St. Paul obtained the agreement of the other petitioners, strangers to the immediate dispute, *to refuse to sell any insurance to its policyholders*. "A valuable service germane to [respondents'] business and important to their effective competition with others was withheld from them by collective action."
>
> The agreement binding petitioners *erected a barrier between St. Paul's customers and any alternative source* of the desired coverage, effectively foreclosing all possibility of competition anywhere in the relevant market. *The concerted refusal to deal went well beyond a private agreement to fix rates and terms of*

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[18] A "sunset clause" limits the reinsurer's liability to those claims presented to it by the primary insurer prior to a specified date.

> *coverage*, as it denied policyholders the benefits of competition in vital matters such as claims policy and quality of service.

Id. at 552-53, 98 S.Ct. at 2935-36 (citation omitted) (emphasis added).

In contrast, plaintiffs here charge no more than an agreement to restrict coverage. But they seek to piggyback this charge on conclusory allegations of pressure and compulsion that echo *Barry*. The decision in *Barry*, however, turned not on the pressure and compulsion directed at policy holders to submit to curtailed coverage, but on the agreement with competitors not to deal with those policy holders on any terms. As the Court said:

> Solely for the purpose of forcing physicians and hospitals to accede to a substantial curtailment of the coverage previously available, St. Paul induced its competitors to refuse to deal on any terms with its customers. ***This agreement did not simply fix rates or terms of coverage***; it effectively barred St. Paul's policyholders from all access to alternative sources of coverage and even from negotiating for more favorable terms elsewhere in the market. The pact served as a tactical weapon invoked by St. Paul in support of a dispute with its policyholders. ***The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott.***

Id. at 544-45, 98 S.Ct. at 2931 (emphasis added).

Thus the issue is not whether defendants used pressure to reduce the coverage available to buyers of insurance. The issue is whether they entered into concerted refusals to deal that denied consumers access to the markets for the desired coverages. The Ninth Circuit explained the meaning of boycott in *Feinstein*: "Because [the agreement] in no way limited the doctors' ability to deal with third parties, the agreement itself is not an agreement to boycott or coerce the plaintiff to purchase the defendants' insurance." 714 F.2d at 933.

The distinction between lawful joint action and prohibited boycott and coercion is also explained in *Proctor v. State Farm Mutual Automobile Insurance Co.*, 561 F.2d 262 (D.C. Cir. 1977):

> The facts in *South-Eastern Underwriters* are a useful guidepost. Logically speaking, a simple agreement among insurance companies to charge certain premium rates could be viewed as a boycott agreement, since its observance would result in a collective refusal to deal with policyholders except at a fixed price. But the Supreme Court's opinion in *South-Eastern Underwriters* did not characterize the basic rate-fixing agreement in that case in terms of "boycott, coercion, or intimidation"; those terms were reserved for the additional activities utilized to enforce the agreement. Since the McCarran Act was passed in response to *South-Eastern Underwriters*, and since a construction of the boycott provision to encompass a simple rate-fixing agreement would indeed emasculate the Act's antitrust exemption, it is reasonable to infer that in a rate-setting context something in the way of enforcement activity would be required to make out a claim of "boycott, coercion, or intimidation" within the meaning of the Act.

Id. at 274 (citation omitted).[19]

This interpretation of boycott and coercion has been consistently followed, in the context of coverage as well as rates. *See, e.g., Meicler v. Aetna Cas. and Sur. Co.*, 506 F.2d 732, 734 (5th Cir. 1975) (parallel actions of insurance companies to refuse to offer insurance except under rate regulation scheme adopted by state not a boycott); *UNR Indus. Inc. v. Continental Ins.*

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[19] The *Proctor* court referred to the Supreme Court's opinion in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), which described the conduct of defendants as consisting of coercion and intimidation to force non-member insurance companies into the conspiracies and to compel persons who needed insurance to buy only from South-Eastern Underwriters on its terms.

Co., 607 F. Supp. 855, 862-63 (N.D. Ill. 1984) (conspiracy among insurance companies to refuse to offer occurrence policies not a boycott); *Grant v. Erie Ins. Exch.*, 542 F. Supp. 457, 464-66 (M.D. Pa. 1982) (conspiracy to refuse to offer insurance covering work loss benefits of individuals killed in motor vehicle accidents not a boycott) *aff'd mem.*, 716 F.2d 890 (3d Cir.), *cert. denied*, 464 U.S. 938, 104 S.Ct. 349, 78 L.Ed.2d 314 (1983).

Professors Areeda and Hovenkamp concur with this view and reject the interpretation of *Barry* urged by plaintiffs:

> The implications of *St. Paul* are not clear. On the one hand, a horizontal agreement among competitors to set the terms of insurance policies—for example, price fixing—is a collective agreement not to deal on any other terms; by the agreement, each enlists the aid of the other, a third party, "to compel capitulation by the boycotted group," namely, insurance buyers. In this sense, virtually any horizontal agreement among competitors could be called a "boycott."
>
> However, there are two reasons for supposing that the Supreme Court did not mean to go that far. First, such a reading would eviscerate the immunity for horizontal agreements on the "business of insurance" and thus seems inconsistent with the statute. Second, *St. Paul* itself did not involve an agreement to adopt similar terms. Instead, it was alleged that three insurers withdrew from the market for an anticompetitive purpose.

P. Areeda & H. Hovenkamp, *Antitrust Law* 210.2, at 107-08 (Supp. 1988).

The gravamen of the cases before the Court is alleged horizontal agreements relating to the terms on which the participants were willing to write insurance and reinsurance. By joint action in the ISO and in the reinsurance and umbrella and excess insurance markets, the various defendants sought to bring about the use of policies that would limit their exposure. There is no

charge and no evidence that any defendants conspired to refuse to do business with any person or firm to achieve their objectives, or that by other improper means they enforced their collective decisions against others.[20]

The distinction between prohibited boycott and coercion and immune joint activities is illustrated by *In re Workers' Compensation Insurance Antitrust Litigation*, 867 F.2d 1552 (8th Cir.), *cert. denied*, ____U.S.____, 109 S.Ct. 3247, 106 L.Ed.2d 593

[20] At the hearing, plaintiffs argued that ISO's withdrawal of statistical support for the 1973 policy forms after regulatory approval had been given by the relevant states to new forms amounted to coercion. The complaints allege in relevant part:

> On July 1, 1987, ISO officially withdrew "support" of the 1973 CGL form. "Support" in this context includes the normal data collection and actuarial services performed by ISO in aid of its member companies. Without such support, most ISO members could not continue to use the 1973 occurrence form, because it is very difficult and expensive for any single company to duplicate the critical ISO support functions. (Cal.Compl't 99; Conn.Compl't 103.)

The conduct alleged, termination of statistical support for a superseded policy form, is on its face reasonable conduct that one would expect in the normal course of business. There is nothing inherently coercive or wrongful about it. There is no allegation that any insurer desired to continue to write insurance on the 1973 policy form but was coerced by defendants into not doing so by means of this conduct, and plaintiffs did not offer to amend their complaints or conduct specific discovery on this point. The allegation that "most ISO members" would find it "difficult and expensive . . . to duplicate the critical ISO support functions" is not sufficient to warrant subjecting these defendants to an antitrust action. *See Ocean State Physicians Health Plan Inc. v. Blue Cross & Blue Shield of Rhode Island*, 883 F.2d 1101, 1109 n.9 (1st Cir. 1989) ("Coercion [under the McCarran Act] has not generally been interpreted to include situations where options have not been entirely closed off to the allegedly coerced parties, even though such options may have been made more expensive"). To hold otherwise would be somewhat ironic, for it is the McCarran Act that allows the insurance industry, including defendants, to provide through ISO the support functions which plaintiffs regard as critical; it makes little sense then to impose antitrust liability on defendants, who are permitted by the McCarran Act to agree to provide the support, for agreeing to discontinue it as to a policy form no longer in use.

(1989). That court held that "the practice of mere price fixing, *i.e.*, a refusal to deal except at a specified price, without more," is not a McCarran Act boycott. *Id.* at 1561. "The crucial element . . . [of a boycott] is an effort to exclude or cause disadvantage to one or more competitors by cutting them off from trade relationships which are necessary to any firm trying to compete." *Id.* at 1561, n.14 (quotation omitted). In reversing a grant of summary judgment of no boycott, the *Workers' Compensation* court relied on evidence of an agreement to exclude competing insurers from membership in the Minnesota Rating Association; such membership was required by Minnesota law as a condition to writing workers' compensation insurance in the state. *Id.* at 1563. In contrast, in the instant case the allegations are limited to collective refusals to do business except upon terms acceptable to defendants. There is not even a suggestion that any underwriter or reinsurer (or anyone else) was prevented from having free and unimpaired access to any market.

The purpose of McCarran Act immunity is to permit joint action by insurers and underwriters within the states' regulatory schemes to formulate policy terms and determine coverage. While it is not a necessary part of the policy development process that the participants would then offer substantially similar policies to the public, it is a consequence that could be reasonably anticipated. To subject the participants in the collective form development process to the risk of antitrust liability for using the product of that process would effectually nullify the McCarran Act. It makes no sense, therefore, for the plaintiffs to rest their boycott claim on the allegation of such an agreement. It is also implicit that joint action comprehends efforts to seek agreement by others, including those who might be unwilling to agree were it not for economic exigencies, and again it makes no sense to assert that such efforts constitute non-immune coercion.

What the McCarran Act leaves unprotected is conduct which goes beyond the making and implementation of agreements to do business only on terms acceptable to the participant (even if such agreements would otherwise violate Section 1), such as refusals to deal on any terms and exclusion from alternative sources. *See Barry*, 438 U.S. at 544-45, 98 S.Ct. at 2931. Such conduct is not charged here.

Dismissal of a complaint for failure to state a claim is not proper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). But judgment of dismissal is appropriate if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). Conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim. *Id.*

Under the well-pleaded allegations of these complaints, plaintiffs could prove no boycott or coercion. Plaintiffs do not suggest that their pleadings could be amended to cure their deficiencies.

Nor have plaintiffs come forward with specific facts which raise a triable issue as to boycott or coercion. And this is true though plaintiffs in their capacity as state regulators conducted lengthy investigations under their regulatory laws which gave them extensive access to the files and records at least of the domestic defendants as well as to other sources of relevant information. Plaintiffs have been given the opportunity also to conduct relevant discovery and have not suggested that they needed discovery to be able fairly to meet this motion.

Accordingly, all defendants are entitled to dismissal of the complaints without leave to amend, or in the alternative summary judgment (considering defendants' submissions outside the pleadings), on all federal law claims in the various complaints. In addition all defendants are entitled to judgment on the Sixth and Seventh Claims of the First Wave Complaints and the Fourth and Sixth Claims of the Second Wave Complaints for failure to allege boycott, coercion, or intimidation. *See Freier v. New York Life Ins. Co.*, 679 F.2d 780, 783 (9th Cir. 1982).

The foreign reinsurer defendants named in the Fifth, Sixth, and Eighth Claims of the First Wave Complaints and the Third, Fourth, and Fifth Claims of the Second Wave Complaints have joined in this motion as an alternate ground for dismissal. They have also made a motion to dismiss on the ground of international

comity which the Court grants. (*See infra* § *V.E(3)*.) Because that motion rests on the proposition that those defendants are not subject to the antitrust laws, it raised the question whether, as a result, they also are not subject to state regulation to a degree sufficient to be entitled to McCarran Act immunity. It does not appear necessary to resolve that issue here; however, if the dismissal on comity grounds is sustained, the alternative ground for dismissal under the McCarran Act will be moot. Conversely, if it is not sustained, it will be because American regulatory laws apply to them and hence the McCarran Act as well.

B. STATE ACTION IMMUNITY, STATUTORY INTERPRETATION, AND CAUSATION

Defendants have moved for summary judgment with respect to those claims which "relate to the collective form-making process in those states that took action to approve, disapprove or withhold approval of the revised ISO CGL forms." (Def. Memo. 1.) This motion, therefore, is limited in its scope; it does not reach conduct outside of the collective activities to revise the CGL policy forms and it does not apply to plaintiff states, or plaintiffs in states, that do not have a procedure for approval, disapproval, or withholding approval of policy forms, namely Alaska, California, Colorado, and Montana. Because plaintiffs' opposition memorandum either misconceives or ignores the narrow scope of this motion, its arguments are in large part irrelevant.

(1) *State Action Immunity*

In *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1934), the Supreme Court held that the Sherman Act was not intended to prohibit states from imposing restraints on competition. The circumstances under which this state action immunity extends to private parties were defined in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980): "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy,' and, second, the State 'must supervise actively any private anticompetitive conduct.'" 445 U.S. at 105, 100 S.Ct. at 943 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) (Brennan, J.)).

(a) *State Policy*

There is no question that all of the states have clearly articulated and affirmatively expressed policies permitting collective policy form development activities. Each of the states has licensed ISO and its members to engage in certain collective activities, including filing of rates and policy forms and developing policy forms.

These actions are governed by *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). There the Supreme Court applied state action immunity to collective rate making activities under state laws permitting—but not requiring—motor carriers to agree on rates subject to the supervision of the state public service commission having authority to accept, reject, or modify the agreed rates. The same situation is presented here. The states have authorized the insurers to agree on policy forms subject to the supervisory authority of the insurance regulators. Most of the states require regulatory approval before a form may be used; others permit a form to be used unless or until the regulators disapprove it. (Def. Memo. 5-6). And here, as in *Southern Motor Carriers Rate Conference*, insurers were not required to participate in the collective activities of ISO and were free to use policies other than those developed and sponsored by ISO.

Plaintiffs argue that the states have authorized only voluntary joint action, not coercion or boycotts. But the fact that the states profit coercion and boycotts does not diminish the immunity flowing from the authority to conduct collective policy development activities. That immunity depends on the presence of active state supervision, as discussed below, and the states' prohibition of coercion and boycott is simply one aspect of this supervision. To argue that the presence of such state law prohibitions nullifies the state action immunity would be to turn the doctrine on its head. The premise of that doctrine is that it immunizes conduct that might otherwise run afoul of the

antitrust laws. It does so "to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered completion in the marketplace." *Southern Motor Carriers Rate Conference*, 471 U.S. at 61, 105 S.Ct. at 1729. It achieves that end by allowing states "to adopt policies that permit, but do not compel, anticompetitive conduct by regulated private parties." *Id.* at 66, 105 S.Ct. at 1731. Under the regulatory schemes of the relevant states, insurers are permitted to engage in collective policy development but are not required to do so or to adopt the collectively produced policies; activities directed to an insurer's individual decision what coverage to offer, as distinct from what terms to include in ISO policy forms, are not claimed to be covered by state action immunity and are not addressed by this motion.

Plaintiffs' reliance on *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187 (9th Cir. 1988), is misplaced. That case held that defendant did not, by reason of having been designated by the state as an exclusive ambulance dispatcher, become immune against a claim that it had restrained competition in the market for air ambulance services. The immunity which attached to dispatch services did not extend to activities in the separate and distinct market for ambulance services. But that reasoning does not apply where, as here, the restraint complained of occurred (though not exclusively) in the course of the protected conduct, *i.e.*, the collective development of terms for policies to be issued by the participating insurers, which was exactly what the states permitted to be done.

(b) *State Supervision*

State action immunity applies only where the state actively supervises "to ensure that [it] will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 1663, 100 L.Ed.2d 83 (1988). Plaintiffs argue that state supervision in this case does not reach the restraints alleged, *i.e.*, "the agreements and acts to limit or eliminate the availability of consumer-demanded coverages." (Unified Opp. 58.) But in *Patrick*, the Court specifically referred

to the state public service commission's "ultimate authority and control over all intrastate rates" in *Southern Motor Carriers Rate Conference* as an example of what constitutes active supervision. *Id.* (quoting *Southern Motor Carriers Rate Conference*, 471 U.S. at 51, 105 S.Ct. at 1723). As noted above, there, as here, supervision took the form of approval, disapproval, or modification of the end product of the collective action. That degree of supervision was sufficient protection of the public interest, without the necessity of additional supervision of the manner in which the participants conducted the collective process.

Plaintiffs contend that, even if the state action immunity otherwise applied, its application here is barred by the McCarran Act which, they contend, specifically reserves application of the Sherman Act to boycott and coercion. *Cf. Ballard v. Blue Shield of Southern W. Va., Inc.*, 543 F.2d 1075, 1078-79 (4th Cir. 1976), *cert. denied*, 430 U.S. 922, 97 S.Ct. 1341, 51 L.Ed.2d 601 (1977). The two immunity doctrines are not congruent and need to be distinguished with care. The McCarran Act, as discussed in section V.A., *supra*, grants to the insurance business a limited immunity from the antitrust laws, conditioned on a degree of state regulation. State action immunity, as discussed here, permits the states to displace the antitrust laws with respect to specified activities actively supervised by the states. *See generally* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶¶ 210.1b, 212.1f, at 113 (Supp. 1988) ("The [Supreme] Court's view of federalism [under *Parker v. Brown*] has left enormous discretion to the states to displace completion."). Plaintiffs' contention was most recently addressed and rejected in *Health Care Equalization Committee v. Iowa Medical Society*, 851 F.2d 1020, 1027 n.10 (8th Cir. 1988), where the court stated that it would be anomalous to hold that Congress, by adopting the McCarran Act, intended to subject insurance companies to antitrust liability for actions that would be exempt if engaged in by others.

The state action immunity motion must therefore be granted.

(2) *Statutory Interpretation*

Defendants also contend that because the effects complained of resulted from the action of the states which approved the use

of the revised policy forms, there could have been no restraint of trade. Their reliance on *In re Airport Car Rental Antitrust Litigation*, 521 F. Supp. 568 (N.D. Cal. 1981), *aff'd*, 693 F.2d 84 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133, 103 S.Ct. 3114, 77 L.Ed.2d 1368 (1983), is, however, misplaced. The restraint complained of in that case flowed from the decision of airport authorities not to lease space to plaintiffs. The fact that that decision may have been influenced by a conspiracy among defendants did not make the defendants responsible for the airport authorities' independent exercise of judgment to exclude plaintiffs. In the instant actions, however, the restraints complained of did not flow from the actions of state regulators who approved or disapproved policy forms; they flowed from the collective actions of defendants by which they allegedly sought to bring about the use of policy forms that restricted available insurance coverage. To the extent that their conduct is not immune from antitrust scrutiny, defendants would be responsible for its consequences.

Defendants also argue that plaintiffs cannot demonstrate the existence of a restraint in the policy form development process. (Reply 1-10.) The argument seems to rest on confusion between Sherman Act liability and the effect of the McCarran Act. There is little question that, in the absence of McCarran Act immunity, allegations of collective action by defendants to bring about reduced coverage for purchasers of insurance would state a claim under Section 1:

> There is no doubt that the members of such [trade] associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny.

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S.Ct. 1931, 1937, 100 L.Ed.2d 497 (1988). It would not

matter for purposes of Section 1 that, as defendants argue, the collective action of defendants did not limit an individual insurer's ability to offer broader coverage. (Reply 5.) The individual insurer's continued freedom is relevant only to application of Section 1013(b) of the McCarran Act, the boycott exclusion, not to liability for anticompetitive agreements.

The motion based on statutory interpretation must therefore be denied.

(3) *Causation*

The foregoing analysis also disposes of defendants' contention that plaintiffs were not injured "by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). No states required insurers to adopt the approved forms. Hence, injury flowing from prohibited collective action to coerce competitors to restrict coverage or deny consumers access to insurance coverage, unless otherwise immune, would fall within Section 4 of the Clayton Act.

There being no disputed issues of fact material to the disposition of this motion, and for the reasons stated, defendants' motion for summary judgment on all claims based on defendants' participation in the collective policy development process asserted by states, and plaintiffs in states, other than Alaska, California, Colorado, and Montana must be granted on the ground of state action immunity, but will otherwise be denied.

C. STANDING

The domestic and foreign reinsurer defendants[21] have moved to dismiss the complaints against them on the ground that plaintiffs do not have standing to complain of actions taken in the reinsurance and retrocessional insurance markets.[22]

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[21] All defendants other than ISO, INA, Hartford, Allstate, Aetna, and CIGNA.

[22] This motion does not include the claims against Merrett and Three Quays alleging an agreement in restraint of trade in the excess and umbrella insurance markets.

The reinsurer defendants characterize the complaints as alleging three distinct insurance markets: primary insurance, reinsurance, and retrocessional insurance. They contend that plaintiffs claim to have participated only in the primary insurance market and that the defendant reinsurers are alleged to have conspired only in the reinsurance and retrocessional insurance markets. On this basis, defendants contend that plaintiffs do not claim to have been directly affected by the alleged conduct of these defendants and that, therefore, plaintiffs do not have standing to assert the antitrust claims pleaded.

To have standing to assert an antitrust claim, a plaintiff must allege that it has suffered harm as a direct result of the defendant's conduct and that this harm is within the scope of the protection of the antitrust laws. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478, 102 S.Ct. 2540, 2547, 73 L.Ed.2d 149 (1982). Accepting, as the Court must, the allegations of the complaint, they establish that the terms and availability of reinsurance directly affected the availability of insurance coverage to consumers. As discussed in section V.A(1), *supra*, plaintiffs' contention is that the reinsurers' alleged conspiracy to eliminate reinsurance for certain CGL coverages "led inexorably to an injury . . . in the interrelated primary insurance market."

The claims against these defendants therefore fall within the analysis in *McCready*, in which a Blue Cross subscriber was found to have standing to challenge an alleged conspiracy between Blue Cross and psychiatrists to deny reimbursement of psychologists' services. Though the restraint occurred in a market (the market for psychiatrists' services) in which plaintiff was not a consumer, the Court reasoned that plaintiff had standing:

> McCready claims that she has been the victim of a concerted refusal to pay on the part of Blue Shield, motivated by a desire to deprive psychologists of the patronage of Blue Shield subscribers. Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends. The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely "'the type of loss that the claimed violations . . . would be likely to cause.'"

457 U.S. at 479, 102 S.Ct. at 2548 (citations omitted). And that was true even though plaintiff's plan coverage was purchased and paid for by her employer; as a consumer of psychotherapy services, she nevertheless was within the area of the economy threatened by a breakdown of competitive conditions resulting from Blue Cross's refusal to reimburse for services she desired.

Plaintiffs' allegations suffice to establish agreements the direct effect of which, if true, would be to restrain the availability of desired coverages in the markets in which plaintiffs purchase insurance. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), is distinguishable. There the plaintiff unions complained of a conspiracy by defendants to abrogate or weaken the collective bargaining relationship between the unions and employers. As the Court there observed, "the Union was neither a consumer nor a competitor in the market in which trade was restrained." *Id.* at 539, 103 S.Ct. at 909. And it was "not clear" whether the Union's interests would be served or disserved by enhanced competition in that market. Moreover, the claim of causation between the Union's injury and the alleged restraint contained "somewhat vaguely defined links." *Id.* at 540, 103 S.Ct. at 909.

On the face of the allegations, plaintiffs have standing. The motion based on lack of standing must be denied.

D. GLOBAL CONSPIRACY CLAIM

Foreign reinsurer defendants have moved to dismiss the First Claim of the Second Wave Complaints, the so-called global conspiracy claim. That claim alleges that all defendants, including the moving defendants, engaged in a conspiracy to restrain the

market for CGL property and casualty risks and for reinsurance and retrocessional reinsurance by agreeing to limit or eliminate occurrence, pollution, retroactive, and long-tail coverage, which are the subjects of the allegations of the complaints. In other words, this claim links all of the various specific claims of wrong-doing by various groups of defendants in various markets to allege one global conspiracy among all defendants.

The moving defendants are foreign reinsurers doing business in London. They are named in the Second, Third, and Sixth claims of the Second Wave Complaints in connection with discrete conspiracy claims. They make this motion on the ground that the First Claim merely lumps together the separate conspiracies elsewhere alleged without any allegation indicating how the separate conspiracies became a single global conspiracy. (Def.Memo. 4.) No question is raised as to the sufficiency of the pleading of the discrete conspiracies in the other claims.

Plaintiffs respond that the complaints "allege that all of the defendants were conspirators who intended to prevent the States from obtaining consumer-demanded insurance coverages." (Unified Opp. 106.) Plaintiffs' theory is that because "the conspiracies alleged are linked by a common purpose, by overlapping defendants and by interconnected acts," a jury could find a single global conspiracy among all the participants in the separate conspiracies. (*Id.* at 109-100.)

A conspiracy is a combination of two or more persons acting in concert to accomplish a common unlawful purpose. A coconspirator need not know the identity of all other conspirators or the full extent of the conspiracy. *E.g., United States v. Metropolitan Enterprises, Inc.*, 728 F.2d 444, 450-51 (10th Cir. 1984). But there must be a common agreement and understanding. Mere identity of purpose, interconnected events, and shared participants, on which plaintiffs base their claim, do not link separate conspiracies into one overall, single conspiracy. (*See* Unified Opp. 110-12.) For separate activities to result in a single conspiracy, the allegations and proof must reflect a wheel and spoke arrangement in which a single person at the hub implements the conspiracy by a series of arrangements with others

to carry out the purpose of their conspiracy. *See, e.g., United States v. Levine*, 546 F.2d 658, 662-63 (5th Cir. 1977). But such separate activities, even if for a common purpose, do not constitute a conspiracy "without the rim of the wheel to enclose the spokes." *Kotteakos v. United States*, 328 U.S. 750, 755, 66 S.Ct. 1239, 1243, 90 L.Ed. 1557 (1946). There must be a connection among all the alleged participants sufficient to support a finding that they had entered into the alleged conspiracy. *Id.* at 754, 66 S.Ct. at 1242. *See also Pinhas v. Summit Health, Ltd.*, 880 F.2d 1108 (9th Cir. 1989) ("Pinhas alleges . . . that as a result of his refusal to sign the 'sham' contract, appellees entered into *a* conspiracy . . . to suspend and terminate his medical staff privileges . . . and to have the report of his termination disseminated. . . .") (emphasis added).

Plaintiffs have made no attempt to show the existence of such a connection to support a finding of a single overall conspiracy, and the allegations of the complaint would not permit proof of one. They allege a number of different conspiracies having different members and different subject matter. For example, the Fifth Claim of the Second Wave Complaints charges some defendants, some of whom are not named elsewhere, with having conspired to restrict the terms under which property insurance and reinsurance would be provided for North American risks. Property insurance has not been alleged to have a connection with CGL insurance of with the market in which CGL insurance is sold. Thus, if all of the facts alleged in the complaint were proved at trial, a conspiracy verdict against these defendants under the First Claim could not stand. The motion of these defendants to dismiss the First Claim of the Second Wave Complaints must therefore be granted.[23]

E. SUBJECT MATTER JURISDICTION AND COMITY

The defendants named in the Sixth and Eighth Claims of the First Wave Complaints and the Fourth and Fifth Claims of the

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[23] At the hearing, the remaining defendants joined in this motion. No objection having been made, this claim will be dismissed against all defendants.

Second Wave Complaints[24] have moved to dismiss those claims for lack of subject matter jurisdiction or on the basis of international comity.[25] The motion is based on the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 ("FTAIA"), and on the doctrine of international comity as stated in *Timberlane Lumber Co. v. Bank of America.*[26]

The following allegations are relevant:

In the Fifth Claim, plaintiffs allege that the defendant, London reinsurers agreed to restrict the terms on which reinsurance would be written and to refuse to reinsure risks written on the occurrence form or "long-tail" risks. They allege agreements among defendants, coercion and intimidation of primary insurers to use the claims-made form and reject the occurrence form, and coercion and intimidation of individuals who might communicate with regulatory bodies. (Conn.Compl't ¶¶ 91, 93, 127-128; Cal.Compl't ¶¶ 87, 89 133-134.) As a result, it is alleged that occurrence liability has become unavailable for many risks and the price of such coverage has increased. (Conn.Compl't ¶ 129; Cal.Compl't ¶ 135.)

In the Sixth Claim, plaintiffs allege that, at a meeting in London, the defendant London reinsurers and one reinsurance broker agreed that all North American casualty reinsurance treaties would be written with a pollution exclusion (Conn.Compl't ¶ 99; Cal.Compl't ¶ 95) lessening the availability and affordability of pollution liability coverage from primary

[24] These claims will be referred to collectively as the Sixth Claim and the Eighth Claim, respectively.

[25] At the hearing these defendants asked that their motion be treated as encompassing also the Fifth Claim of the First Wave Complaints and the Third Claim of the Second Wave Complaints (collectively referred to as the Fifth Claim). No objections having been made, the issues having been fully briefed, and in the absence of prejudice to plaintiffs, this request is granted.

[26] *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976) ("*Timberlane I*"), *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984) ("*Timberlane II*"), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985).

insurers throughout the United States (Conn.Compl't ¶ 97; Cal.Compl't ¶ 93).

In the Eighth Claim, plaintiffs allege that a group of London retrocessional reinsurers, including the seven named defendants, agreed in 1987 to boycott retrocessional reinsurance treaties which included coverage for North American property risks, unless the original insurance coverage contained a seepage, pollution, and contamination exclusion clause. (Conn.Compl't ¶ 138(b); Cal.Compl't ¶ 149(b).) As a result, seepage and pollution coverage has been excluded from policies on American risks, and prices for such coverage have been increased. (Conn.Compl't ¶ 139; Cal.Compl't ¶ 150.)

(1) *The Factual Background*

The London insurance markets in which the defendants named in the Fifth, Sixth, and Eighth Claims conduct their reinsurance and retrocessional reinsurance business are composed of underwriters at Lloyd's of London, other London insurance firms ("London Company Market" firms), and brokers who obtain coverage in these markets. *See, e.g., Edinburgh Assurance Co. v. R.L. Burns Corp.*, 479 F. Supp. 138, 144 (C.D. Cal. 1979), *aff'd in part and rev'd in part on other grounds*, 669 F.2d 1259 (9th Cir. 1982); *Syndicate 420 at Lloyd's, London v. Early American Ins. Co.*, 796 F.2d 821, 824 (5th Cir. 1986); *Travelers Indemnity Co. v. Booker*, 657 F. Supp. 280, 282-83 (D.D.C. 1987).

As described in *Edinburgh Assurance*, the purchase and sale of insurance in London takes place on the floor of the underwriting room at Lloyd's and in the offices of individual insurance companies. A Lloyd's or London Company Market agent evaluates and negotiates proposed insurance placements brought by brokers for the consideration of the syndicate of underwriters that the agent represents.[27] F. Supp. at 145. A "slip" (a broker-

[27] Underwriters at Lloyd's must be individuals trading for their own accounts. However, underwriters band together into syndicates represented by one or more underwriting agents. Department of the Treasury, Report to Congress on the Taxation of Income Earned by Members of Insurance or Reinsurance Syndicates 5-6 (February, 1989).

originated document containing the essential features of the coverage sought) is presented to each underwriter. *Id.* Because many risks are too large to be insured by just one London market participant, the broker circulates the slip among numerous underwriting agents, each of whom makes the individual decision whether to underwrite a portion of the risk. *See id.* Because the spreading of large risks in the London reinsurance and retrocessional insurance markets necessarily requires numerous subscribers (*see* Conn.Compl't ¶ 4(w); Cal.Compl't ¶ 28), negotiations over the terms and conditions on which risks will be accepted and insured are integral to the functioning of the market. Underwriters negotiate with brokers over the terms on which they are willing to accept a risk. Because different underwriters may be willing to accept a particular risk on different terms, brokers and underwriters may have to negotiate mutually agreeable terms and conditions on which that risk will be accepted. *See Edinburgh Assurance*, 479 F. Supp. at 145.

The sequence of insurance transactions resulting in the purchase of reinsurance and retrocessional reinsurance in the London markets begins with the purchase of primary insurance by the consumer. The primary insurer in the United States may then elect to reinsure some portion of the portfolio of risks it has underwritten. (Conn.Compl't ¶ 4(p); Cal.Compl't ¶ 26.) The form of reinsurance most pertinent to these cases is known as "treaty" reinsurance (Cal.Compl't ¶ 27), in which the reinsurance company agrees in advance to indemnify a primary insurance company for a defined portion of the risks to be assumed by the primary carrier during the treaty period (Conn.Compl't ¶ 4(w); Cal.Compl't ¶¶ 4(p), 27). As a participant in a reinsurance treaty, a reinsurer does not deal directly with primary insurance consumers or individual risks and may never know the identity of individual risks within the portfolio of risks included in the treaty. *See Excess and Casualty Reinsurance Ass'n v. Ins. Comm'r*, 656 F.2d 491, 492, 495 (9th Cir. 1981); *American Re-Insurance Co. v. Insurance Comm'r*, 527 F. Supp. 444, 453 (C.D. Cal. 1981). When the primary insurer seeks reinsurance coverage in the London market, one of several reinsurance centers, it initiates the type of reinsurance transaction which is the subject of the Sixth Claim.

Reinsurers also purchase reinsurance. This step in the sequence of reinsurance transactions, and the one which is the subject of the Eighth Claim, may occur in the London market for retrocessional reinsurance. Retrocessional reinsurance means reinsurance of the business written by reinsurers. (*See also* Conn.Compl't ¶ 4(r); Cal.Compl't ¶ 107.) Plaintiffs' Eighth Claim refers to the so-called LMX market which consists of those retrocessional reinsurers who specialize in providing retrocessional reinsurance for Lloyd's of London and the London Company Market firms. (Conn.Compl't ¶ 111; Cal.Compl't ¶ 107.) At this level, the purchaser of retrocessional reinsurance is a Lloyd's or London Company Market reinsurer.

(2) *Subject Matter Jurisdiction*

By virtue of the FTAIA, the Sherman Act does "not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations . . ." unless that conduct has a "direct, substantial, and reasonably foreseeable effect" on commerce within the United States, import trade into the United States, or export trade engaged in by a person within the United States. 15 U.S.C. § 6a.

Plaintiffs contend that the conduct alleged involved agreements to restrain the provision of reinsurance for American risks, and hence the import into the United States of insurance services. These allegations are sufficient to invoke the import exception of the FTAIA.

Defendants contend that the FTAIA applies nevertheless because the conduct complained of in these claims is wholly foreign commerce. The subject matter of the alleged agreement, however, concerned the provision of reinsurance within the United States, and the allegations of effects in United States markets are sufficient to preclude a characterization of wholly foreign commerce.

The First Wave Complaints allege that the London Market is one of the three principal markets for the supply of reinsurance (Cal.Compl't ¶ 29), and all complaints allege that the

agreements made in the London market had the effect of limiting the ability of primary insurers to obtain reinsurance except on certain terms, and for a higher price (Conn.Compl't ¶¶ 97, 100, 134, 139; Cal.Compl't ¶¶ 138, 140, 148, 150). The complaints further allege that the availability of primary coverage hinges on the primary insurers' ability to obtain reinsurance of risks (Conn.Compl't ¶ 4(p); Cal.Compl't ¶ 34), and that the availability of reinsurance hinges on the availability of retrocessional reinsurance (Conn.Compl't ¶¶ 110, 114; *see* Cal.Compl't ¶ 150). Thus, plaintiffs have adequately alleged that a decision not to provide reinsurance or retrocessional reinsurance to cover certain types of risks in the United States has a direct effect on the availability of primary insurance in the United States. *Cf. McGlinchy v. Shell Oil Co.*, 845 F.2d 802, 815 (9th Cir. 1988) (no direct, substantial, and reasonably foreseeable effect on United States commerce where agreements involved orders for products in South East Asia and other areas outside the United States). Therefore, the FTAIA does not apply.

Where the FTAIA does not apply, the Court must determine whether it has subject matter jurisdiction under the analysis in *Timberlane I*: (1) whether the alleged restraint affected or was intended to affect the foreign commerce of the United States, and (2) whether it is a cognizable violation of the Sherman Act.[28]

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[28] There is some uncertainty whether the *Timberlane* analysis for extraterritorial application of the antitrust laws has been superseded by the FTAIA. It is arguable that the FTAIA codifies the standard for determining whether there is extraterritorial jurisdiction for all cases, not only for those cases involving non-import trade. *See* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 236, at 235 (Supp. 1988). ("The most interesting question about the new statute is whether its standard for appraising export restraints differs from that for appraising import restraints or whether it merely 'codifies' a general understanding of when American antitrust should be concerned about restraints abroad that might affect United States interests only indirectly, insubstantially, or unforeseeably."); Hawk, *International Antitrust Policy and the 1982 Acts; The Continuing Need for Reassessment*, 51 Fordham L. Rev. 201, 222 (1982) ("[i]t is . . . not clear whether the specific effect test set forth in the Act is limited to determining whether export transactions of purely foreign transactions have the requisite effect on United States trade. The te[st]

(Footnote continued)

549 F.2d at 615. The allegations that establish a direct effect in the United States are sufficient to establish this Court's subject matter jurisdiction under *Timberlane I.*

(3) *International Comity*

Regardless of whether subject matter jurisdiction exists, this Court may determine that its jurisdiction under the antitrust laws should not be exercised on the ground of international comity. *See Timberlane I*, 549 F.2d at 613-14.[29] This issue is properly raised and disposed of by a Rule 12(b)(1) motion so long as the merits of plaintiffs' antitrust claims are not reached. *Timberlane II*, 749 F.2d at 1382.

Timberlane I established a rule of reason controlling the extraterritorial application of the antitrust laws. It requires an analysis of whether, as a matter of international comity and fairness, extraterritorial jurisdiction should be asserted. *Timberlane I*, 549 F.2d at 615.

This analysis is governed by seven factors:

> [T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative

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might also be used in determining whether *import* transactions . . . have the requisite effect on United States trade.") *See also* the dictum in *McGlinchy*, 845 F.2d at 813 n.8, that the FTAIA was passed "[i]n an effort to provide a single standard for the issue of extraterritorial application of the Sherman Act." In that case, however, the FTAIA clearly applied because export and foreign transactions were involved. Until there is a clearer indication that *Timberlane I* no longer controls, however, this Court must follow it.

[29] The legislative history of the FTAIA states that "[i]f a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts' ability to employ notions of comity, *see, e.g., Timberlane Lumber Co. v. Bank of America*, 549 F.2d 1287 (3rd Cir. 1979) [sic]." H.R.Rep. No. 97-686 at 13 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin.News at 2431, 2487, 2498.

> significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States compared with conduct abroad.

Id. at 614. Each of these seven factors, discussed below, must be balanced in every case. *Timberlane II*, 749 F.2d at 1383 n.3; *see also Star-Kist Foods, Inc. v. P.J. Rhodes & Co.*, 769 F.2d 1393, 1395 (9th Cir. 1985) (applying *Timberlane* factors to extraterritorial application of the Lanham Act); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 428-29 (9th Cir. 1977) (same). The object of this analysis is to determine whether "the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction." *Timberlane I*, 549 F.2d at 614-15.[30]

(a) *Degree of Conflict With Foreign Law or Policy*

The London reinsurance and retrocessional reinsurance business, the subject of these claims, takes place in a regulatory and competitive framework established by the British government. In 1870, Parliament, by the Lloyd's Act, established the Society of Lloyd's and empowered it to regulate the marketplace composed of its members. The Lloyd's governing body continues to be empowered to exercise quasi-governmental authority in regulating the activities of its members. Lloyd's Acts, 1870-1982. The London Company Market companies are incorporated in

[30] *Timberlane* has been criticized for requiring courts to balance American and foreign interests which they are not equipped or qualified to do. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948-50 (D.C. Cir. 1984) (substantial limits on court's ability to conduct balancing); Aldisert, *Federal Courts and Extraterritorial Antitrust Law; Enlightened Self Interest or Yankee Imperialism?*, 5 J.L. & Com. 415, 419-20, 426-29 (1985) (courts unaccustomed to evaluating interests of other nations); Note, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 Yale L.J. 1693 (1985) (courts poorly equipped). Its authority in this circuit, however, remains unimpaired.

the United Kingdom in accordance with the Companies Act, 1985, are regulated by the Insurance Companies Act, 1982, and associated regulations, and are supervised by the British Department of Trade and Industry. Agreement among British insurers, reinsurers, and retrocessional reinsurers (including both Lloyd's and London Company Market underwriters) relating to the provision of insurance services are expressly exempted from British regulation of anti-competitive agreements. *See* Restrictive Trade Practices (Services) Order 1976, S.I. 1976 No. 98, Schedule ¶ 8.

Plaintiffs argue that, because the Treaty of Rome of 1957, which governs trade regulation in the European Economic Community, is part of the law of England, *In re Westinghouse Uranium Contract* [1978] A.C. 547, 564, there is no conflict with English law or policy. Article 85 of the treaty prohibits

> all agreements . . . and concerted practices . . . which have as their object and effect the prevention, *restriction* or distortion *of competition within the common market* and in particular those which: (a) . . . fix purchase or selling prices or any other trading condition; [or] (b) limit or control production, markets, technical development, or investments. . . .

(Emphasis added.) Article 85 has been held to outlaw restrictive practices in the insurance industry notwithstanding its regulation by the state in which it is located. *Verband der Sachversicherer eV v. E.C. Commission*, 4 Common Mkt.Rep. (CCH) 264 (1988). Article 85, plaintiffs contend, establishes that enforcement of American antitrust law is consistent with applicable foreign law.

It seems doubtful, however, that this Article would be applied to outlaw long-standing practices in the London reinsurance market, openly conducted in conformity with English law. Moreover, the Treaty of Rome by its terms applies only to trade between member states, not to trade with a non-member such as the United States, and Article 85 applies only to restriction of competition within the common market.

With respect to the relevant United States-English trade, the evidence of conflict between the antitrust laws and English law and policy is substantial. English courts have repeatedly expressed unmitigated hostility to the extraterritorial application of American antitrust laws. *See In re Westinghouse Uranium Contract*, 1978 A.C. 547, 591 (counsel for the government), 616 (Judgment of Lord Wilberforce), 639 (Judgment of Lord Diplock), 650 (Judgment of Lord Fraser of Tullybelton); *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1952] 2 All E.R. 780 (CA), (LEXIS, Enggen library, Cases file at 10) (Judgment of Sir Evershed, M.R.). *See also Laker Airways Ltd. v. Sabrena, Belgian World Airlines*, 731 F.2d 909, 946 (D.C.Cir. 1984).

An English "blocking" statute restricts the availability of evidence and production of documents for use in judicial proceedings in the United States. Protection of Trading Interests Act, 1980, ch. 11, § 2, *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 959, at F-1; *see* Note, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 Colum.L.Rev. 1097, 1106-09 (1981) (describing the blocking provision of the Protection of Trading Interests Act). The Protection of Trading Interests Act provides a remedy to English antitrust defendants to recover from plaintiffs the punitive portion of a foreign multiple damage judgment against them where the foreign judgment concerns activities outside the enforcing nation's territory.[21] Protection of Trading Interests Act, *supra*, at § 6; *see* Note, 81 Colum. L. Rev. at 1109-13 (describing section 6 of the Act). This Act has been applied several times notwithstanding the Treaty of Rome. *See* Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 Stan. J. Int'l L. 247, 251-52 & n.29 (1982) (between its passage and 1982, the Act applied to issuance of directives barring compliance with American orders, some of which involved U.K. subsidiaries of U.S. parents).

[21] This ("clawback") provision was aimed at the "pernicious extraterritorial effect doctrine" of American antitrust law. 973 Parl.Deb. H.C. (5th Series) 1535 (1979). It also reflects a view that multiple damages are penal and should be imposed only in proceedings incorporating the protection of criminal proceedings. *See* Note, 81 Colum.L.Rev. at 1103-04.

On balance, the Court concludes that enforcement of the antitrust laws against activities in the London reinsurance market would lead to significant conflict with English law and policy. This conflict, unless outweighed by other factors in the comity analysis, is itself a sufficient reason to decline exercise of jurisdiction. *Timberlane II*, 749 F.2d at 1384.

(b) *The Nationality or Allegiance of the Parties and the Locations of Principal Places of Business of Corporations*

All plaintiffs are located in the United States. Although all defendants named in the Fifth, Sixth, and Eighth Claims are located in England and are of English nationality, many of the corporate defendants are subsidiaries of American corporations and may be influenced by the allegiance of their American parents.[22] But it is also true that adjudication of this claim would require the testimony of witnesses and the production and analysis of documents located in England. *See Timberlane II*, 749 F.2d at 1384; *Star-Kist*, 769 F.2d at 1396.

On balance this factor weighs against the exercise of jurisdiction.

(c) *The Extent to Which Enforcement by Either State Can Be Expected to Achieve Compliance*

A number of barriers stand in the way of enforcement of any judgment against these defendants by English courts. Those courts have previously refused to aid in the enforcement of the judgment of an American court where that court had exercised what the English court considered unlawful extraterritorial jurisdiction. *See British Nylon Spinners, Ltd. v. Imperial*

[22] Note that England, however, does not recognize the extraterritorial application of the laws of the parent corporation's state based on the parent's control of the subsidiary. Note, 81 Colum.L.Rev. at 1100-01. English authorities, moreover, take the position that, in any event, the laws and policies of the territorial state must be accorded primacy. *See* Griffin, *Possible Resolutions of International Disputes Over Enforcement of U.S. Antitrust Law*, 18 Stan. J. Int'l L. 279, 286 (1982).

Chemical Industries, Ltd., 1 Ch. 19 (1953); 1 Ch. 37 (1955); *see also* the discussion at section V.E.(3)(b), *supra*.

Plaintiffs could collect a judgment by enforcing it against such assets of defendants as may be found in the United States. But it is improbable that there could be enforcement of the requested injunctive relief against activities in London. Indeed, the Protection of Trading Interests Act allows the British Secretary of State for Industry to forbid British nationals from complying with foreign antitrust judgments. Protection of Trading Interests Act, *supra* at § 1; *see* Note, 81 Colum.L.Rev. at 1104-06.

Thus this factor tips slightly against the exercise of jurisdiction.

(d) *The Relative Significance of Effects on the United States as Compared With Those Elsewhere*

This factor requires a comparison of the effect of the alleged illegal conduct on the commerce of the United States with its effect abroad. *Timberlane II*, 749 F.2d at 1384.

Plaintiffs allege that half of the reinsurance business covers North American risks. (Conn.Compl't ¶ 4(h); Cal.Compl't ¶ 4(t).) There are no allegations showing what percentage of those risks involved reinsurance for CGL policies covering risks within the United States. And there are no allegations with respect to the relative effects of retrocessional reinsurance agreements. It is clear, however, that the conduct of defendants had a sufficiently significant effect in the United States to make this factor weigh in favor of the exercise of jurisdiction.

(e) *The Extent to Which There Is Explicit Purposes to Harm or Affect United States Commerce*

As in *Timberlane II*, the conduct of defendants complained of in these claims was directed primarily at reducing their exposure to certain risks and controlling losses, a legitimate business purpose. Their actions (as described in section V.E(1) *supra*) were "consistent with [local] customs and practices." *Timberlane II*, 749 F.2d at 1385. The allegations of the complaints that defendants' purpose was to restrict the availability of certain types

of CGL coverage (Conn.Compl't ¶¶ 132, 137; Cal.Compl't ¶¶ 138, 148) is not inconsistent with the existence of a legitimate business purpose for their actions.

This factor, therefore, weighs against the exercise of jurisdiction.

(f) *Foreseeability of Such Effect*

Defendants concede that the factor of foreseeability of the effect in the United States of their conduct weighs in favor of the exercise of jurisdiction. (Def.Memo. 23.)

(g) *The Relative Importance to the Violation Charged of Conduct Within the United States as Compared with Conduct Abroad*

The conduct of the defendant reinsurers or retrocessional reinsurers alleged in the Sixth and Eighth Claims is not alleged to have occurred within the United States. Some of the conduct alleged in the Fifth Claim, however, allegedly occurred in the United States. Defendants are alleged to have coerced primary insurers and to have communicated with others to bring about rejection of the occurrence form. Thus relevant conduct occurred within the United States, but its genesis lay in the alleged agreements among the participants in the London market and its purpose was to further those agreements. The alleged activities in the United States are an incident of the market agreement which is the gravamen of the action.

Although the activities within the United States are not insignificant, their significance derives from the alleged foreign agreements. In those circumstances, this factor must be considered as neutral.

(h) *Conclusion*

The foregoing analysis leads to the conclusion that the conflict with English law and policy which would result from the extra-territorial application of the antitrust laws in this case is not

outweighed by other factors. Although the conduct complained of had effects within the United States, it is not alleged to have excluded competitors from markets or denied consumers access to markets, and it is not alleged to have occurred for that purpose.

The pendent state law claims assert claims similar to those arising under the federal antitrust laws. To the extent that they are based on the conduct alleged in the Fifth, Sixth, and Eighth Claims, they should be dismissed for the same reasons. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 727, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1430 (9th Cir. 1984).

VI. CONCLUSION

Subsequent to the issuance of this ruling, plaintiffs for the first time asked for leave to amend their complaints. The Court has examined Attachment A to plaintiffs' memorandum to vacate judgment or for leave to amend or permit discovery, setting forth the substance of the proposed amendments. Nothing in that attachment would affect the grounds for the Court's ruling. The plain fact is that plaintiffs seek to recover on a theory that, as heretofore explained at length, will not stand under the law.

For the same reason, plaintiffs' discovery request must be denied. That request is based on rather unprofessional assertions to the effect that the Court criticized or faulted the states for not producing evidence or taking discovery and on a misrepresentation of the Court's ruling. (Plf. Memo. 12.) The States have conducted investigations into the subject matter of these actions for some two years, with all the investigatory powers available to sovereign governments. They were given the right under the pretrial order to conduct discovery relevant to the issues raised by defendants' motions. They are represented by numerous attorneys expert in the antitrust laws. The Court must conclude that the allegations they made in their complaints and the facts they proffered in opposition to the motions represent their best effort—and nothing indicates the contrary.

The Court's ruling accepts the facts alleged in plaintiffs' complaints and their opposition to the motions, and it rests on those facts. There are no factual disputes material to this ruling, which simply applies the law to those facts.

For the reasons stated, judgment will be entered for all defendants dismissing the federal claims in these actions in accordance with the foregoing ruling. The pendent state claims will be dismissed for lack of subject matter jurisdiction, except as otherwise ordered.

IT IS SO ORDERED

APPENDIX

Actions in MDL Docket 767
Insurance Antitrust Litigation

88-0981	State of California, *et al.* v. Hartford Insurance Company, Aetna Casualty and Surety Company, CIGNA Corporation, Insurance Services Office, Inc., Peter N. Miller. Robin A.G. Jackson, Merrett Underwriting Agencies Mgt., Ltd., Three Quays Underwriting Ltd., Janson, Green, Ltd., Edwards and Payne Management (U.A.), Ltd., C.J. Warrilow-Hine & Butcher, Ltd., J. Brian Hose & Others, Ltd., Harvey Bowring, Ltd. — Murray Lawrence & Partners, K.F. Alder & Others (U.A.), Ltd., Unionamerica Insurance Co., Ltd.
88-0983	State of New York, *et al.* v. Hartford Fire Insurance Company, *et al.*
88-0984	Commonwealth of Massachusetts, *et al.* v. Hartford Fire Insurance Company, *et al.*
88-0985	State of Minnesota, *et al.* v. Hartford Fire Insurance Company, *et al.*

88-0986	State of West Virginia, *et al.* v. Hartford Fire Insurance Company, *et al.*
88-0987	State of Wisconsin v. Hartford Fire Insurance Company, *et al.*
88-0988	State of Alabama, *et al.* v. Hartford Fire Insurance Company, *et al.*
88-1009	State of Arizona, *et al.* v. Hartford Fire Insurance Company, *et al.*
88-1318	Big D Building Supply Corp. v. Hartford Fire Insurance Company, *et al.*
88-1492	Anastasios Markos T/A v. Hartford Fire Insurance Company, *et al.*
88-1587	Bay Harbor Park Homeowner's Association, Inc. v. Aetna Casualty
88-2327	State of Maryland v. Hartford Fire Insurance Company, *et al.*
88-2328	State of Washington, *et al.* v. Hartford Fire Insurance Company, *et al.*
88-2329	State of New Jersey v. Hartford Fire Insurance Company, *et al.*
88-2330	State of Colorado v. Hartford Fire Insurance Company, *et al.*
88-2331	State of Ohio, *et al.* v. Hartford Fire Insurance Company, *et al.*
88-2332	State of Connecticut v. Hartford Fire Insurance Company, *et al.*

88-2333	Commonwealth of Pennsylvania, *et al.* v. Hartford Fire Insurance Company, *et al.*
88-2334	State of Alaska, *et al.* v. Hartford Fire Insurance Company, *et al.*
88-2335	State of Montana v. Hartford Fire Insurance Company, *et al.*
88-2341	State of Michigan, *et al.* v. Hartford Fire Insurance Company, *et al.*
88-2569	Environmental Aviation Sciences, Inc. v. Hartford Fire Insurance Company, *et al.*
88-3662	Carlisle Day Care Center, Inc. v. Hartford Fire Insurance Company, *et al.*
88-3673	Discount Plywood Centers, Inc. v. CIGNA Corporation, *et al.*
88-3674	Acme Corrugated Box Co. v. CIGNA Corporation, *et al.*
88-3677	P & J Casting Corp. v. Hartford Fire Insurance Company, *et al.*
88-3792	Henry L. Rosenfeld v. Hartford Fire Insurance Company, *et al.*
88-3793	Ace Check Cashing, Inc. v. Hartford Fire Insurance Company, *et al.*
88-4538	Glabman Paramount Furniture Mfg. Co., Inc. v. CIGNA Corporation, *et al.*
88-4560	Durawood, Inc. v. CIGNA Corporation, *et al.*

88-4561	Bensalem Township Authority v. CIGNA Corporation, *et al.*
88-4562	Keyboard Communications, Inc. v. CIGNA Corporation, *et al.*
88-4564	Carmella M. "Boots" Liberto v. Hartford Fire Insurance Company, *et al.*
88-4799	Les-Ray Bobcat, Inc., *et al.* v. Hartford Fire Insurance Company, *et al.*
88-4800	Jerry Grant Chemical Associates, Inc. v. Hartford Fire Insurance Company, *et al.*
88-1131	State of Louisiana, *et al.* v. Hartford Fire Insurance Company, *et al.*

** REVISED**

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

INSURANCE ANTITRUST LITIGATION

v.

DOCKET NUMBER: MDL 767/C88-1688 WWS

NAME OF JUDGE OR MAGISTRATE
William W. Schwarzer

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

In accordance with the Court's Revised Memorandum of Decision and Order of October 10, 1989, judgment is entered for all defendants dismissing the federal claims in the actions appended to the Order. The pendent state claims are dismissed for lack of subject matter jurisdiction, except as otherwise ordered.

Entered in Civil Docket 10/24, 89

Filed October 10, 1989
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California

CLERK: Richard W. Wieking

DATE: 10/10/89

(BY) DEPUTY CLERK: /s/Wynette Bailey
Wynette Bailey

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re:

INSURANCE ANTITRUST LITIGATION

ACE CHECK CASHING, INC.; ACME CORRUGATED BOX COMPANY, INC.; ANASTASIOS MARKOS, t/a Municipal Exxon; BAY HARBOR PARK HOMEOWNER'S ASSOCIATION, INC.; BENSALEM TOWNSHIP AUTHORITY; BIG D BUILDING SUPPLY CORPORATION, et al.,

Private Plaintiffs,

Plaintiffs-Appellants,

and

STATE OF ALABAMA et al.,

Plaintiffs, No. 89-16405

vs. DC# CV-88-1688-WWS

AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY, et al,

Defendants-Appellees.

STATE OF CALIFORNIA; CITY OF LAFAYETTE; CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SAN BENITO,

Plaintiffs-Appellants,

and

STATE OF ALABAMA et al.,

Plaintiffs, No. 89-16405

vs. DC# CV-88-1688-WWS

AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY, et al,

Defendants-Appellees.

STATE OF CALIFORNIA; CITY OF LAFAYETTE; CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SAN BENITO,

Plaintiffs-Appellants,

vs. No. 89-16513
DC# CV-88-0981-WWS

INSURANCE SERVICES OFFICE, INC., CN ARE (U.K.) Ltd.; CONTINENTAL REINSURANCE CORPORATION; UNION-AMERICA INSURANCE CO.; EDWARDS & PAYNE Ltd.; EXCESS INSURANCE CO., Ltd.; GENERAL REINSURANCE CORP.; THOMAS A. GREENE & COMPANY, Inc.; KEMPER REINSURANCE LONDON; LLOYD'S UNDERWRITERS & BROKERS; MERCANTILE & GENERAL REINSURANCE COMPANY OF AMERICA; NORTH AMERICAN REINSURANCE CORPORATION; OXFORD SYNDICATE MGMT. Ltd.; (sued herein as K.F. Adler & Others (U.A.) Ltd.); PRUDENTIAL REINSURANCE; REINSURANCE ASSOCIATION OF AMERICA; TERRA

NOVA INSURANCE CO.; AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; WINTERTHUR REINSURANCE CORPORATION OF AMERICA; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY,

Defendants-Appellants.

STATE OF NEW YORK; ROOSEVELT ISLAND OPERATING AUTHORITY; VILLAGE OF GROTON; VILLAGE OF LAKE SUCCESS,

Plaintiffs-Appellants,

vs.

No. 89-16514
DC# CV-88-0983-WWS

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; et al.

Defendants-Appellees.

COMMONWEALTH OF MASSACHUSETTS; TOWN OF HANOVER; TOWN OF MILFORD,

Plaintiffs-Appellants,

vs.

No. 89-16515
DC# CV-88-0984-WWS

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; et al.,

Defendants-Appellees.

STATE OF MINNESOTA,

Plaintiff-Appellant,

vs.

No. 89-16516
DC# CV-88-0985-WWS

HARTFORD FIRE INSURANCE COM-~~PANY;~~ AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; et al.,

Defendants-Appellees.

STATE OF WEST VIRGINIA; CITY OF CLAY; COUNTY OF HANCOCK; COUNTY OF MINERAL; COUNTY OF WIRT,

Plaintiffs-Appellants,

vs.

No. 89-16517
DC# CV-88-0986-WWS

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; et al.,

Defendants-Appellees.

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

No. 89-16518
DC# CV-88-0987-WWS

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; et al.,

Defendants-Appellees.

CITY OF MOBILE; STATE OF ALABAMA; CITY OF BIRMINGHAM,

Plaintiffs-Appellants,

vs.

AETNA CASUALTY AND SURETY COMPANY; WINTERTHUR REINSURANCE CORPORATION OF AMERICA; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE,

Defendants-Appellees.

No. 89-16519
DC# CV-88-0988-WWS

STATE OF ARIZONA,

Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,

Defendants-Appellees.

No. 89-16520
DC# CV-88-1009-WWS

STATE OF MARYLAND,

Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,

Defendants-Appellees.

No. 89-16521
DC# CV-88-2327-WWS

STATE OF WASHINGTON; COUNTY OF COWLITZ,

Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,

Defendants-Appellees.

No. 89-16522
DC# CV-88-2328-WWS

STATE OF NEW JERSEY,

Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,

Defendants-Appellees.

No. 89-16523
DC#CV-88-2329-WWS

STATE OF COLORADO,

Plaintiff-Appellant,

vs.

WINTERTHUR REINSURANCE CORPORATION OF AMERICA; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; et al.,

Defendants-Appellees.

No. 89-16524
DC# CV-88-2330-WWS

STATE OF OHIO; TOWNSHIP OF JACKSON; COUNTY OF HARDIN,

Plaintiffs-Appellants,

vs. — No. 89-16525, DC# CV-88-2331-WWS

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,

Defendants-Appellees.

STATE OF CONNECTICUT,

Plaintiff-Appellant,

vs. — No. 89-16526, DC# CV-88-2332-WWS

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,

Defendants-Appellees.

COMMONWEALTH OF PENNSYLVANIA; COUNTY OF SCHUYLKILL; CITY OF ALTOONA; CITY OF YORK; BOROUGH OF CHAMBERSBURG,

Plaintiffs-Appellants,

vs. — No. 89-16527, DC# CV-88-2333-WWS

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,

Defendants-Appellees.

STATE OF ALASKA,

Plaintiff-Appellant,

vs. — No. 89-16528, DC# CV-88-2334-WWS

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,

Defendants-Appellees.

STATE OF MONTANA; COUNTY OF TETON,

Plaintiffs-Appellants,

vs. — No. 89-16529, DC# CV-88-2335-WWS

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,

Defendants-Appellees.

STATE OF MICHIGAN,

Plaintiff-Appellant,

vs. — No. 89-16530, DC# CV-88-2341-WWS

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,

Defendants-Appellees.

STATE OF LOUISIANA; CITIES OF BATON ROUGE, NEW ORLEANS, SLIDELL, NACHITOCHES AND EUNICE,

Plaintiff-Appellant,

vs.

No. 89-16531
DC# CV-88-1131-WWS

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; et al.,

Defendants-Appellees.

Before: BEEZER, and NOONAN, Circuit Judges,
SINGLETON,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Beezer and Noonan have voted to reject the suggestion for rehearing en banc and Judge Singleton expresses no opinion regarding the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

* The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

Statutory Provisions Involved

United States Code

Title 15

The Sherman Act

Section 1 of the Sherman Act, 15 U.S.C. § 1, enacted July 2, 1890, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 7 of the Sherman Act, 15 U.S.C. § 6a, enacted on October 8, 1982, as part of the Foreign Trade Antitrust Improvements Act, provides:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) Such conduct has a direct substantial, and reasonably foreseeable effect—
>
> A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for the injury to export business in the United States.

(2)

No. 91-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, THREE QUAYS UNDERWRITING MANAGEMENT LIMITED, JANSON GREEN MANAGEMENT LIMITED, MURRAY LAWRENCE & PARTNERS, D.P. MANN UNDERWRITING AGENCY LIMITED, ROBIN A.G. JACKSON, PETER N. MILLER, EDWARDS & PAYNE (UNDERWRITING AGENCIES) LIMITED AND STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED,

Petitioners,

v.

STATE OF CALIFORNIA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI PURSUANT TO RULE 12.4

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STATEMENT PURSUANT TO RULE 29.1

The petitioners' affiliates for purposes of Rule 29.1 are as follows:

Petitioner Unionamerica Insurance Company Ltd.: The Continental Corporation, The Continental Insurance Company, The Hong Kong Fire Insurance Co. Limited, Continental Insurance Company (Europe) Ltd., Continental Reinsurance Corporation (U.K.) Limited.

Petitioner Continental Reinsurance Corporation (U.K.) Limited: The Continental Corporation, The Continental Insurance Company, The Hong Kong Fire Insurance Co. Limited, Continental Insurance Company (Europe) Ltd., Unionamerica Insurance Company Ltd.

Petitioner CNA Re (U.K.) Ltd.: Loews Corporation, CNA Financial Corporation, Continental Casualty Company, CNA Management Company, Ltd.

Petitioner Excess Insurance Company, Ltd.: ITT Corporation, ITT Hartford Group, Inc., Hartford Fire Insurance Company, Hartford International Insurance Company, London & Edinburgh Insurance Group, Ltd.

Petitioner Kemper Reinsurance London, Ltd.: Kemper Reinsurance Company, Kemper Europe Reassurances, S.A., Kemper Reinsurance Company, Kemper Corporation, Lumberman's Mutual Casualty Company, KREL Services Limited.

Petitioner Terra Nova Insurance Company Limited: Ian Morton Underwriting Agency Ltd.

Petitioner Ballantyne, McKean & Sullivan Limited: None within the meaning of Rule 29.1 of the Rules of the Supreme Court of the United States.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

No. 91-1128

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, THREE QUAYS UNDERWRITING MANAGEMENT LIMITED, JANSON GREEN MANAGEMENT LIMITED, MURRAY LAWRENCE & PARTNERS, D.P. MANN UNDERWRITING AGENCY LIMITED, ROBIN A.G. JACKSON, PETER N. MILLER, EDWARDS & PAYNE (UNDERWRITING AGENCIES) LIMITED AND STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED,

Petitioners,

v.

STATE OF CALIFORNIA, *et al.,*

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI PURSUANT TO RULE 12.4

Respondents Terra Nova Insurance Company Limited, Unionamerica Insurance Company Ltd., Continental Reinsurance Corporation (U.K.) Limited, CNA Re (U.K.) Ltd., Kemper Reinsurance London, Ltd., Excess Insurance Company, Ltd. and Ballantyne, McKean & Sullivan Limited submit this response pursuant to Supreme Court Rule 12.4 to the petition for a writ of certiorari bearing

No. 91-1128. The undersigned parties, all British corporations doing business in the London reinsurance market, are co-defendants in the district court with petitioners. By this response they support the arguments made in the petition and urge this Court to issue the writ it seeks.[1]

These respondents are similar to petitioners in most pertinent respects. In common with petitioners, they are all participants in the London reinsurance and retrocessional reinsurance market. Six of the seven signatories are reinsurers, all British corporations;[2] they are referred to in the complaints and in the district court opinion as "London Company Market" firms.[3] They operate in the same market and in substantially the same manner as do petitioners. They are subject to the Com-

[1] These respondents are petitioners in petition No. 91-1146.

[2] None of these six reinsurers is either "Lloyd's" or part of Lloyd's, notwithstanding the Court of Appeals' language at several points lumping together all defendants arguing the comity issue at "Lloyd's." *See* A-30 and 31. (Numbers following the letter "A" denote reference to the Appendix to the petition.)

The reinsurer signatories were also incorrectly lumped together by the Court of Appeals in its statement that "all of them [are] subsidiaries of American corporations. . ." (A-10) and the conclusion that it held followed that the "interests of Britain are at least diminished where the parties are subsidiaries of American corporations" (A-29). Aside from the fact that such a relationship does not exist as to all these parties, at no point did any plaintiff plead that any (much less all) of these reinsurers were owned by American corporations. The Court of Appeals stated that the district court so "found" (A-29). But clearly that court could not do so on a motion to dismiss and its comment on this point (A-75) must have derived from arguments made in plaintiffs' briefs rather than from anything alleged in any complaint. In any event, the principal point is that these respondents are all regulated British entities; their parentage should be irrelevant to the comity analysis.

[3] *See, e.g.*, A-67. The plaintiffs named only six (6) such defendants out of approximately 100 reinsurers operating in the London Company Market. *See* Reinsurance Offices Association Annual Report 1990, p. 11.

panies Act 1985, the Insurance Companies Act 1982 and associated regulations and are supervised by the Secretary of State for Trade and Industry (A-6). The remaining respondent, Ballantyne, McKean & Sullivan Limited, is a reinsurance broker subject to regulation under the Lloyd's Acts. As a broker authorized to trade in the Lloyd's marketplace, it is supervised by the governing body of Lloyd's.

All of these respondents are defendants only in the three discrete claims of the complaints which deal with, and only with, conduct occurring in the London reinsurance market. Indeed, as plaintiffs' complaints make clear, these parties were brought into the case solely as London-market participants and not because of any alleged relationship with plaintiffs (or with any other insurance consumer for that matter) or because of any conduct allegedly undertaken in the United States. Further, none of the undersigned is alleged to be a co-conspirator as to any remaining count of the complaints, the Court of Appeals' implication (A-29) to the contrary notwithstanding.

The Ninth Circuit's international comity ruling raises a question of global import. As petitioners explain, this Court should issue the writ because (i) the courts of appeals have generated conflicting and confusing rulings on the application of principles of international comity to actions arising under the U.S. antitrust laws; (ii) this case presents the issue starkly because the Ninth Circuit found a significant conflict with the regulatory regime of a foreign nation, but nevertheless held that effects on United States commerce outweighed that conflict, even though the conduct at issue was wholly foreign and no U.S. parties were involved; and (iii) this Court has, as it must, regularly taken the lead in resolving questions concerning the reach of United States law in the international arena.

For these reasons and the others set forth in the petition, these respondents urge this Court to issue the writ.

Respectfully submitted,

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7 4 4 3

Nos. 91-1111, 1128, 1131, & 1146

In The

Supreme Court of the United States

October Term, 1991

HARTFORD FIRE INSURANCE CO., et al.,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether allegations that insurers' enlistment of reinsurers and others in agreements not to trade, as a means of compelling competitors to stop selling certain insurance products to American consumers, are sufficient to state a claim of "boycott, coercion or intimidation" within the meaning of section 3(b) of the McCarran-Ferguson Act.

2. Whether insurers' participation in unregulated, and, therefore, nonexempt, conspiratorial conduct even qualifies for the antitrust exemption provided by section 2(b) of the McCarran-Ferguson Act.

3. Whether, under the state action doctrine, approval of an insurance policy form developed by a trade association results in antitrust immunity for unauthorized and unsupervised marketplace activities to compel competing insurers to use the form and stop selling certain insurance products to American consumers.

4. Whether foreign reinsurers' self-regulation of some aspects of their business should preclude a federal court from exercising jurisdiction over the foreign reinsurers' anticompetitive conduct when (i) that conduct was targeted at American markets; (ii) that conduct had direct, substantial and foreseeable effects on American commerce; and (iii) no relevant regulation, foreign or domestic, compels or authorizes the anticompetitive conduct.

QUESTIONS PRESENTED – Continued

5. Whether American insurance consumers have standing to sue for injunctive relief and damages under the antitrust laws when they suffer antitrust injury to business or property as a result of a restraint of trade in the market in which they purchase insurance.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The other petitions to which this consolidated opposition brief apply are styled:

Merrett Underwriting Agency Management Limited, et al. v. State of California, et al., No. 91-1128;

Winterthur Reinsurance Corp. of America v. State of California, et al, No. 91-1131; and

Unionamerica Insurance Co. Ltd., et al. v. State of California, et al, No. 91-1146.

Governmental Plaintiffs (Respondents):

State of Alabama
State of Alaska
State of Arizona
State of California
State of Colorado
State of Connecticut
State of Louisiana
State of Maryland
Commonwealth of Massachusetts
State of Michigan
State of Minnesota
State of Montana
State of New Jersey
State of New York
State of Ohio
Commonwealth of Pennsylvania
State of Washington
State of West Virginia
State of Wisconsin
Borough of Chambersburg, Pennsylvania
City of Altoona, Pennsylvania

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT – Continued

City of Baton Rouge, Louisiana
City of Birmingham, Alabama
City of Clay, West Virginia
City of Eunice, Louisiana
City of Lafayette, California
City of Mobile, Alabama
City of Nachitoches, Louisiana
City of New Orleans, Louisiana
City of San Francisco, California
City of Slidell, Louisiana
City of York, Pennsylvania
County of Cowlitz, Washington
County of Hancock, West Virginia
County of Hardin, Ohio
County of Mineral, West Virginia
County of San Benito, California
County of San Francisco, California
County of Schuylkill, Pennsylvania
County of Teton, Montana
County of Wirt, West Virginia
Roosevelt Island [New York] Operating Authority, Inc.
Town of Hanover, Massachusetts
Town of Milford, Massachusetts
Township of Jackson, Ohio
Village of Lake Success, New York
Village of Groton, New York

Private Plaintiffs (Respondents):

Ace Check Cashing, Inc.
Acme Corrugated Box Company, Inc.
Anastasios Markos, t/a Municipal Exxon
Bay Harbor Park Homeowners' Association, Inc.
Bensalem Township Authority

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT – Continued

Big D Building Supply Corporation
Carlisle Day Care Center, Inc.
Carmella M. "Boots" Liberto, t/a R.J. Liberto, Inc.
Durawood, Inc.
Environmental Aviation Sciences, Inc.
Glabman Paramount Furniture Mfg. Co., Inc.
Henry L. Rosenfeld, t/a Mobile Check Cash
Jerry Grant Chemical Associates, Inc.
Keyboard Communications, Inc.
Kirklington Park, Inc.
Les Ray Bobcat, Inc.
P & J Casting Corp.

Defendants (Petitioners):

Allstate Insurance Company
Aetna Casualty & Surety Company
CIGNA Corporation
Hartford Fire Insurance Company
Insurance Services Office, Inc.
Reinsurance Association of America
Constitution Reinsurance Corporation
General Reinsurance Corporation
Mercantile & General Reinsurance Company of America
North American Reinsurance Company
Prudential Reinsurance Company
Winterthur Swiss Insurance Company
Thomas A. Greene & Company, Inc.
C.J.W. (Underwriting Agencies) Limited
D.P. Mann Underwriting Agency Limited
Edwards & Payne (Underwriting Agencies) Limited
Janson Green Management Limited

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT – Continued

Lambert Brothers (Underwriting Agencies) Limited
Merrett Underwriting Agency Management Limited
Murray Lawrence & Partners
Sturge Reinsurance Management Ltd.
Peter N. Miller
Robin A.G. Jackson
Three Quays Underwriting Management Limited
R.K. Carvill & Company
Unionamerica Insurance Company Ltd.
Continental Reinsurance Corporation
(U.K.) Limited
CNA Re (U.K.) Ltd.
Kemper Reinsurance London, Ltd.
Excess Insurance Company, Ltd.
Terra Nova Insurance Company Limited
Ballantyne, McKean & Sullivan Limited

Private plaintiffs do not have any corporate parents or subsidiaries within the meaning of Rule 29.1.

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RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals is reported at 938 F.2d 919 (UA App. A1-A35)[1] The opinion of the district court is reported at 723 F.Supp. 464 (UA App. A36-A86).

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1991. Timely petitions for rehearing were denied on October 15, 1991. UA App. A87-A99. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in these petitions are sections 1 and 7 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 & 6a (Merrett App. A93); the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, *et seq.* (Hartford App. 98a- 99a); and sections 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§ 15(a) & 26 (UA App. A100-A102).

STATEMENT

This case comes to this Court without the development of a factual record, in a posture in which the allegations of the plaintiffs' complaints and the reasonable inferences to be drawn from them must be taken as true.[2]

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[1] Of the four petitions filed with this Court, the appendix to the petition filed in *Unionamerica Insurance Co., Ltd., et al.*, No. 91-1146 is the most complete. Respondents' Consolidated Brief uses that appendix where possible, citing it as "UA App."

[2] *Summit Health Ltd. v. Pinhas*, 111 S.Ct. 1842, 1845 (1991). Despite its appearance before this Court, this case remains in

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Plaintiffs' allegations are reviewed by the Court of Appeals at 938 F.2d at 922-924 (UA App. A13-A18).

At its core, this case is about the enlistment of "reinsurers to compel capitulation" to the demands of a handful of firms. 938 F.2d at 929, UA App. A26. The goal of these firms was to limit the scope of insurance products sold in the United States. *Id.* More specifically, the complaints allege as follows.

In 1984, defendant primary insurers were dissatisfied with the breadth of risks covered by commercial general liability insurance policies.[3] They wanted to shrink the coverage offered in the market, but could not unilaterally cease offering the broader coverages without risking the loss of market share to competitors who remained willing to sell the broader coverage. *See, e.g.,* Conn. Cmpt. ¶¶ 65-67, UA App. A175.

Consequently, the primary insurer defendants, and the domestic and foreign reinsurers they enlisted, conspired to force unwilling competitors to stop insuring certain risks.[4] Collectively, they withdrew necessary inputs required by competing primary insurers who wanted to continue writing these risks. They agreed to withhold reinsurance from U.S. primary insurers who

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its infancy, having been confined by the trial court to motions designed to test the legal sufficiency of the pleadings. Pre-Trial Order No. 2, ¶ 3. The trial court allowed discovery "insofar as necessary for these motions" (UA App. 38, n. 2), but expressly limited that discovery to matters not likely to raise disputed issues of fact. Pre-Trial Order No. 2, ¶ 5. As a result, no discovery was conducted.

[3] Commercial general liability (CGL) insurance provides coverage against third party claims for businesses and state and local governments.

[4] For example, defendants sought to exclude all pollution coverage.

were unwilling to comply with the conspirators' demands. Without reinsurance, a critical input, the capacity of primary companies to offer coverage to their customers would be drastically eroded. Thereafter, defendant Insurance Services Office, Inc. (ISO), the trade association of primary insurers, withdrew statistical support for the risks.[5] *See, e.g.,* Cal. Cmpt. ¶¶ 63-100, UA App. A123-131.

To achieve the full goals of the conspiracy, defendants also moved to limit excess and umbrella coverage as well as property insurance coverage, to conform to changes effectuated in CGL coverages. By these coordinated steps, defendants were largely able to compel competing insurers to stop selling insurance written on policy forms that would have provided the broader coverage, and to use exclusively the lesser forms which the conspirators forced upon ISO.[6] *See, e.g.,* Cal. Cmpt. ¶¶ 101-110, UA App. A131-133.

No state insurance regulator reviewed or approved the coercive conduct that generated these lesser forms. No state insurance regulator reviewed or approved the conduct that forced the use of these forms in the marketplace. 938 F.2d at 931, UA App. A29.

As the complaints allege, the United States argued[7], and the court of appeals found, this case is about

[5] Statistical support provides information that insurers need to price an insurance product.

[6] No state's approval of the conspirators' new policy forms constituted disapproval of older forms. Absent the conspiracy, all forms would have remained available for use in the marketplace.

[7] The United States filed a brief as *amicus curiae* in the court of appeals. In its brief, the United States argued that (i)

(Continued on following page)

agreements by a few primary insurers and reinsurers to replace existing insurance products with a lesser quality product, and the enforcement acts taken by defendants to compel the market success of the lesser product. Defendants' enforcement acts, most notably the withholding of necessary reinsurance and statistical support services, are central to this case. Defendants used these economic weapons to force unwilling firms to stop offering higher quality insurance products to American consumers.

MISSTATEMENTS IN THE PETITIONS.

The petitions contain numerous contradictions and misstatements of fact. In compliance with Supreme Court Rule 15.1, plaintiffs note the following major misstatements in the petitions:

1. The Hartford petition describes this case as involving "nothing more" than "agreements among" insurers and reinsurers "over coverage risks they were willing to accept". Hartford Ptn. 2. This case, however, involves "much more." 938 F.2d at 929, UA App. A25. The complaints expressly allege that primary insurer defendants met with reinsurers to formulate and set in a motion a joint strategy to eliminate specific coverages from the market. *See*, e.g., Conn. Cmpt. ¶¶ 68, 69, 73, UA App. A175-A177. The complaints also allege that, in furtherance of this goal, reinsurers "threaten[ed] to withhold

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the complaints allege conduct constituting boycott, coercion or intimidation under the McCarran-Ferguson Act; (ii) the state action doctrine does not prohibit antitrust scrutiny of the alleged boycotts; and (iii) principles of international comity do not preclude judicial review of these cases. The decision of the Court of Appeals is in accord with these arguments.

reinsurance from the market for primary companies" that persisted in offering this coverage (Cal. Cmpt. ¶ 71, UA App. A124); reinsurers "threatened a boycott of North American CGL risks unless" the coverages were eliminated (Cal. Cmpt. ¶ 74, UA App. A125); reinsurers collectively refused to cover certain risks (Cal. Cmpt. ¶¶ 95 & 108, UA App. A130 & A133); and ISO withdrew support services for coverages that included these risks. Conn. Cmpt. ¶ 103, UA App. A183-A184; *See also* Conn. Cmpt. ¶ 116-117, UA App. A186-A187; 938 F.2d at 929, UA App. A25. The Winterthur petition even concedes that plaintiffs alleged that primary insurers "induced defendant reinsurers to refuse to provide reinsurance to insurers writing CGL policies on existing ISO forms." Winterthur Ptn. 3.

2. The Hartford petition asserts that states sanctioned the defendants' activities because "state law authorized collective forms development". Hartford Ptn. 27. States, however specifically prohibit boycotts, which is the conduct at issue in these cases. *See e.g.*, Md. Ann. Code Art. 48A, § 220 (1986); N.J. Stat. Ann. 17:29B-4(4) (1985); *See also* UA App. A61. As the Ninth Circuit found, the challenged conduct "was neither a reasonable nor necessary consequence of the conduct regulated and approved by the state." 938 F.2d at 931, UA App. A30.

3. The Hartford petition asserts that "state agencies made substantive determinations of conformity with state policy." Hartford Ptn. 28. The regulators reviewed forms, not market conduct. As the court of appeals found, nothing in the evidence shows that the relevant states supervised or approved the boycotts used to produce agreement on the content or use of the forms. 938 F.2d at 931, UA App. A29.

4. The Hartford petition asserts that insurance and reinsurance markets are so intimately entwined that state regulation of primary insurers is *de facto* regulation of

reinsurers. Hartford Ptn. 15. The Winterthur petition, on the other hand, states that it "strains credulity" to suggest that activities in one market, including boycotts, affect any other market. Winterthur Ptn. 19-20.

5. The Merrett and Unionamerica petitions state that the Ninth Circuit "dismissed" the global conspiracy claim in the Connecticut-style complaints. Merrett Ptn. 4, n. 2; Unionamerica Ptn. 6-7, n. 6. The Ninth Circuit found this count "consistent" with its opinion and mandated that "[o]n remand to the district court, plaintiffs should be afforded the opportunity to amend" to cure a technical pleading defect. 938 F.2d at 931, UA App. A30.

REASONS FOR DENYING THE WRIT

The court of appeals decision does not warrant review. Defendants' real challenge is not to the legal standards applied by the court of appeals. Rather, defendants contest the court of appeals' construction of the facts of these cases as alleged in plaintiffs' complaints. Still seeking to mischaracterize those allegations, defendants seek certiorari on questions not presented by this case.

In resolving the questions actually presented by plaintiffs' allegations, the decision below is faithful to this Court's prior interpretations of the McCarran-Ferguson Act and the state action doctrine. The decision also accords with this Court's articulated principles of international comity and standing. It accords as well with the decisions of other circuits.

In no respect does the case present questions of exceptional legal and practical importance. Defendants cannot seriously contend that the egregious conduct described in plaintiffs' complaints must be countenanced to assure the survival of the insurance industry. No basis for certiorari has been presented.

The decision below concerned motions brought under Federal Rules of Civil Procedure 12(b) and 56 to "test the validity of . . . critical allegations in the complaint[s]." RT at 21 (June 23, 1988). No discovery was conducted in advance of these motions. Nevertheless, at this early stage of the litigation, defendants continue to press a view of the case that differs categorically from the view of plaintiffs. Disputes over case characterization provide no basis for certiorari. Defendants have stated no reasonable basis for review of the decision of the court of appeals and, on the limited factual record before this Court, there is no basis for review.

I. THIS CASE PRESENTS NO OPPORTUNITY TO CLARIFY THE REACHES OF THE MCCARRAN-FERGUSON ACT.

The McCarran-Ferguson Act "embod[ies] a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 220 (1979). In striking a balance between competition and regulation, the Act exempts from antitrust scrutiny conduct that is the business of insurance and is regulated by the state. 15 U.S.C. § 1012 (b). Otherwise qualified conduct is denied this exemption, however, if it constitutes an agreement or act of boycott, coercion or intimidation. 15 U.S.C. § 1013 (b). These cases allege boycott, coercion and intimidation. Further, these cases allege participation by domestic insurers in unregulated foreign reinsurance activity – conduct that does not even qualify for the McCarran exemption in the first instance. Delicate questions of balance do not arise. The antitrust laws apply.

The court of appeals' holdings on the McCarran-Ferguson Act defenses are unsuited to review by this Court. They present numerous issues, each of which this

Court would need to resolve in defendants' favor before the outcome of these cases would change. Defendants have asked this Court to reject the court of appeals' reading of the complaints; to reverse the court of appeals' opinion that the challenged conduct is a boycott under the McCarran Act; and to reverse the court of appeals' conclusion that the McCarran Act does not shield conspirators' participation in nonexempt conduct. These issues are fact-bound. Moreover, each was resolved below based on conventional applications of legal principles established by this Court.

A. Defendants' petition for certiorari asks this Court to reject the definition of boycott expressed in *St. Paul Fire & Marine Insurance Co. v. Barry*, and used by this Court throughout its history.

The court of appeals observed the clear line between conduct constituting an actionable boycott and conduct constituting permissible joint activity. It correctly found, 938 F.2d 929; UA App. A27, as the United States had urged in its *amicus curiae* brief at 16, that the conduct alleged in this case falls well on the boycott side of the distinguishing line.

The court of appeals' decision rested squarely on *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978), this Court's explanation of the boycott exception in the McCarran-Ferguson Act. In *Barry*, this Court surveyed the long line of Supreme Court precedent giving rise to a "common understanding" of the term boycott. *Barry*, 438 U.S. at 541-45. The court of appeals found that the plaintiffs' allegations fit "exactly" within this common understanding. 938 F.2d at 929, UA App. A26. In its brief *amicus curiae*, the United States had urged that result, commenting that

> the combination of primary insurers and reinsurers alleged by plaintiffs falls well within the 'common understanding' (*Barry*, 438 U.S. at 552) of boycott, coercion or intimidation. Indeed, it is precisely the kind of conduct characterized as a boycott, coercion and intimidation in the Sherman Act case that led to the passage of the McCarran-Ferguson Act and with which Congress was specifically concerned when it included [the boycott exclusion in the McCarran-Ferguson Act].

Brief for the United States as *amicus curiae*, filed below, at 16.[8]

Defendants, however, attempt to manufacture a controversy from the colloquy between the majority and dissent in *Barry*. Yet, the majority and dissent in *Barry* would agree that the facts presented here constitute a

[8] The legislative history of the McCarran-Ferguson Act demonstrates that Congress carefully distinguished voluntary agreements among insurers on policy terms – which could claim antitrust immunity if regulated by the state – from combinations designed to force unwilling competitors to adhere to terms through the concerted denial of necessary trade relationships – which were expressly denied immunity. *Barry*, 438 U.S. at 547-50. Indeed, the Act recognizes that "the vice in the industry was not that there were rating bureaus, but that there was in the industry a system of private government which had been built up by a small group of insurance companies." *Barry*, 438 U.S. at 548, quoting Senator O'Mahoney. Senator O'Mahoney describes as "absolutely" unprotected "any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which is attempting to do business in the insurance field in any way that was disapproved by them. . . . " 91 Cong. Rec. 1480 (1945) (Statement of Senator O'Mahoney). The central allegations of the complaints concern these kinds of prohibited agreements.

boycott. The majority in *Barry* described a boycott as "[t]he enlistment of third parties in an agreement not to trade, as a means of compelling capitulation of the boycotted group. . . . " *Barry*, 438 U.S. at 544-45. The dissent in *Barry* chose different words, but approved the same concept, concluding that *McCarran* boycotts concern "attempts by members of the insurance business to force other members to follow the industry's private rules and practices." *Barry*, 438 U.S. at 565.

Thus, the *Barry* majority and minority agree on a bright line test. Whatever else a McCarran boycott may be, it indisputably includes what is alleged here: agreements and acts to withhold an essential input from other insurers as means of forcing their acquiescence. The court of appeals' application of *Barry* was conventional and correct.

Grasping at straws, defendants claim that a McCarran-Ferguson boycott does not exist unless "competing insurance companies [are] absolutely excluded from the market" or there is a "total refusal to deal on any terms". Hartford Ptn. 24. This Court has never required such a finding. Indeed, the case that served as the model for the boycott exception in the McCarran-Ferguson Act, *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 535 (1944), involved neither situation.

South-Eastern Underwriters involved a conditional refusal to deal.[9] The facts of *South-Eastern Underwriters* are markedly similar to those involved here. Both cases

[9] So-called "conditional" refusals are classic boycotts. *E.g.*, *Fashion Originators Guild v. FTC*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U.S. 600 (1914). These boycotts are not designed to drive competitors from the market. Rather, they are designed to force unwilling competitors to adhere to particular terms of trade.

concern conspirators who refused to deal in order to force unwilling competitors to acquiesce to their terms. In both, reinsurance was withdrawn as the means of forcing acquiescence. Both allege conduct falling well within the common understanding of boycott.

Defendants refer to a "debate" in which some lower courts attempt to distinguish between refusals to deal on any terms (absolute refusals) and refusals to deal on some terms (partial refusals). They would classify only the former as a boycott. This debate is not pertinent here because it only concerns consumer boycotts.[10] The present case does not allege consumer boycotts. It alleges concerted refusals to deal to force competitors to adopt conspirators' trade restrictions.[11]

Some lower courts may seek to confirm that a particular consumer boycott is coercive by inquiring into the absolute or partial nature of the refusal to deal. However, a boycott to force a competitor to adhere to trade terms dictated by conspirators is by definition coercive.[12] Thus,

[10] The cases cited by defendants as holding that an absolute refusal to deal is essential are consumer boycott cases. *See Grant v. Erie Ins. Exchange*, 542 F. Supp. 457 (M.D. Pa. 1982), *aff'd mem.*, 716 F. 2d 890 (3d Cir.), *cert. den.*, 464 U.S. 938 (1983) and *UNR Industries Inc. v. Continental Ins. Co.*, 607 F. Supp. 855 (N.D. Ill. 1984).

[11] Defendants' citation to 9 E. Kintner & J. Bauer, *Federal Antitrust Law* 245 (1989) is, thus, curious. Kintner & Bauer distinguish consumer boycott cases from those where "a partial or conditional refusal to deal . . . is designed to coerce the target to conform to certain conduct." In the latter situation, Kintner & Bauer note the lack of conflict among lower courts, citing the overwhelming majority of cases holding that an absolute refusal to deal is not required. *Id.* at 245-46.

[12] Contrary to defendants' assertions, this case is not about ordinary course-of-business arrangements against which

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courts confronting boycotts against competitors have not used, and need not use, the elusive distinction between partial and absolute refusals to deal to corroborate coercion.

Decided well within the contours of the "common understanding" of boycott, this case simply presents no opportunity for this Court to test the reaches of its definition of boycott under the McCarran-Ferguson Act.

B. Defendants' exemption forfeiture arguments actually seek to expand the scope of the limited antitrust exemption established by the McCarran-Ferguson Act.

As an additional and independent ground for denying McCarran-Ferguson protection to the defendants' conduct, the court of appeals held that the Act's protection did not extend to the domestic defendants' participation in unregulated agreements with the foreign defendants.[13] Relying on *Beltz Travel Service v. International Air Transport Assn.*, 620 F.2d 1360 (9th Cir. 1980), the

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other insurers found it difficult or expensive to compete. This case is about one group of competitors (defendant primary insurers) seeking to discipline another group of competitors (the unwilling primary insurers) by inducing suppliers (reinsurers and ISO) not to provide necessary supplies (reinsurance and statistical support) unless the unwilling primary insurers acceded to the trade terms of the defendant primary insurers. Thus, there is no necessity in this case to distinguish between "economic exigencies" that flow from the need to respond to protected horizontal agreements and "coercion." The facts as alleged are well within the traditional concept of a boycott.

[13] Petitioners do not challenge the court of appeals' holding that the conduct of the foreign reinsurers fails to qualify for the McCarran exemption because it is not regulated by the states.

court of appeals found an "exemption forfeiture" as a result of domestic insurers' joining in the unregulated (and therefore non-exempt) conduct of foreign reinsurers.

In its holding, the court of appeals applied well-accepted principles. First, "[i]t is well settled that exemptions from the antitrust laws are to be narrowly construed." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979).[14] Second, there is nothing novel about holding an otherwise exempt entity liable when it conspires in non-exempt conduct. For example, in the labor exemption context, this Court has stated:

> A union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. . . . But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it had agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry *and the union is liable with the employers if it becomes a party to the conspiracy.*

Mine Workers v. Pennington, 381 U.S. 657, 665-66 (1965) *quoted in Royal Drug*, 440 U.S. at 232, n.39 (emphasis added).[15]

[14] *See, e.g., Abbott Laboratories v. Portland Retail Druggists Assn.*, 425 U.S. 1, 11-12 (1976); *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 622 (1975); *FMC Corp. v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956).

[15] Defendants claim that the court of appeals exemption forfeiture decision is contrary to *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). Hartford Ptn. 16. However, there is

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The record as it currently stands provides no basis for a reconsideration of these long-standing principles. The line between exempt and non-exempt conduct can best be drawn on a well developed factual record, and not on the bare allegations of even a well-pleaded complaint.

Moreover, defendants' exemption forfeiture argument would expand the limited exemption established by the McCarran-Ferguson Act. There is no legal justification for doing so.

The present record fails to indicate in anyway that the insurance industry will become less efficient if this Court fails to expand the McCarran exemption to include insurer conspiracies involving unregulated foreign reinsurance activity. The unavailability of the McCarran

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nothing in *Pireno* that is inconsistent with the decision below. In *Pireno*, this Court considered the factors for determining what is the "business of insurance" under the McCarran Act, and noted that involvement of non-insurance companies in challenged conduct does not necessarily disqualify conduct from being characterized as the "business of insurance." This discussion is not relevant to the present cases, however, because the exemption forfeiture analysis of the court of appeals rested on the "state regulation" prong of the McCarran Act, and not on "the business of insurance" requirement. In short, the court of appeals' unchallenged finding is that the foreign reinsurers' conduct fails to qualify for the McCarran exemption because it is not state regulated. 15 U.S.C. § 1012(b). In finding that the domestic insurers also had no McCarran exemption, the court of appeals below followed this Court's precedent making all conspirators liable for the unlawful acts of their co-conspirators. *See, e.g., Mine Workers v. Pennington*, 381 U.S. at 665-66; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1948).

exemption does not automatically impose antitrust liability on insurers for joint conduct with foreign reinsurers. If an insurer has no exemption with respect to certain conduct, that conduct simply becomes subject to antitrust scrutiny, not necessarily antitrust liability.[16]

Moreover, most companies have no trouble discerning the difference between lawful agreements regarding the supply of important inputs and unlawful agreements to deny competitors such inputs unless the competitors accept particular terms of doing business. The court of appeals' decision leaves insurers free to purchase reinsurance but properly warns them against using such arrangements as exclusionary devices directed against competitors.

The insurance industry ought not be surprised or confused by the court of appeals' ruling. Reinsurers have long regarded themselves as being without antitrust exemption, and have generally conducted their business accordingly.[17] Certainly, primary insurers cannot claim to

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[16] Agreements between insurers and reinsurers are akin to purchase and sale agreements between vertically related firms in any other industry. Reinsurance is an input into insurance, the finished product. An insurer purchasing reinsurance is like Chrysler purchasing steel. Both transactions secure inputs into the finished product. Neither transaction is ordinarily an antitrust violation.

[17] N. David Thompson, president and chief executive officer of Defendant North American Re, expressed this view in *Forum*, a publication of the American Bar Association:

> Reinsurers have generally conducted their operations free from the type of regulation to which primary insurers are subject in most jurisdictions. Reinsurance rates are not approved or filed. Reinsurance treaty provisions are not governed by statute or regulation, except for special matters such as

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be hamstrung in their ordinary operations because the court in this case followed settled law and refused to expand an antitrust exemption to include the egregious conduct alleged in the complaints. The McCarran-Ferguson Act has never protected the conduct challenged in these complaints.

II. THE DECISION BELOW RESTS ON A CONVENTIONAL APPLICATION OF THE STATE ACTION DOCTRINE.

This Court has repeatedly held that the state action doctrine immunizes the conduct of private persons from antitrust scrutiny only when that conduct is: (1) undertaken pursuant to a clearly articulated and affirmatively expressed state policy; and (2) actively supervised by the State. *California Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) ("*Midcal*"). This two-pronged test assures that the challenged anticompetitive conduct is that of the State itself. *Patrick v. Burget*, 486 U.S. 94 (1988). Contrary to defendants' assertion that the court of appeals did not apply "the *Midcal* criteria," Hartford Ptn. 9, the court faithfully applied these criteria. Defendants simply failed to meet the requirement of either prong of the test.

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> the nearly universal insolvency clause. . . . Thus, reinsurers have been outside the protection of the McCarran Act and so, at least, since the decision in the *South Eastern Underwriters* case, they are fully exposed to the enforcement of the antitrust laws, state as well as federal. (Footnote omitted.)

N. David Thompson, *Critical Issues of the Eighties: How Trends in Reinsurance Will Affect Legal, Legislative, and Regulatory Actions*, 16 Forum 1038, 1055 (1980-1981).

First, defendants' conduct was not authorized by any state policy. Indeed, state unfair insurance practices laws expressly prohibit boycotts. See, e.g., Md. Ann. Code Art. 48A, § 220 (1986). N.J. Stat. Ann. 17:29B-4(4) (1985). Second, as the court of appeals found, there is nothing in the record to demonstrate that states supervised or approved the boycotts alleged. 938 F.2d at 931, UA App. A29. Moreover, because some of the anticompetitive acts occurred *after* the approval of policy forms, supervision was impossible.[18] This case presents no issue as to either prong of *Midcal*, and, therefore, no basis for certiorari.

Defendants argue that if states have a clearly articulated policy of permitting joint forms development, then they implicitly have a clearly articulated policy permitting all behind-the-scenes coercive activity that might conceivably be related to the creation and use of a particular form. This argument would expand the state action doctrine to immunize agreements denying competitors access to essential inputs, and the boycotts implementing those agreements, even absent any evidence of public authorization, approval or supervision of the agreements and boycotts. Such an expansion of the state action doctrine would be completely at odds with the decisions of this Court.

In *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978), this Court summarily rejected the defendants' approach. There, four medical malpractice insurance companies agreed that three would not sell insurance to doctors in Rhode Island in order to force

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[18] For example, a key boycott allegation of the complaints is the withdrawal of support for competing ISO forms. Conn. Cmpt. ¶¶ 101-104, UA App. A183-A184; *See also* Cal. Cmpt. ¶¶ 97-100, UA App. A131. As defendants admit, this was not accomplished until "more than a year after the approved 1986 forms had become effective." Hartford Ptn. 6.

them to accept new coverage terms set by St. Paul, the fourth insurer. There, as here, defendants had filed forms with state insurance regulators related to the boycotted coverages. Nevertheless, this Court found no suggestion that the State had authorized the concerted refusals to deal with St. Paul's policyholders. *Barry*, 438 U.S. at 554, n. 26.

The court of appeals adopted the same reasonable distinction in the present case. Approval of policy forms is not approval of market boycotts. The conduct of defendants in these cases "was neither a reasonable nor necessary consequence of the conduct regulated by the state." 938 F.2d at 931, UA App. A30. Defendants simply fail to meet either prong of the *Midcal* test. No further review is warranted.

Because the facts of this case are so unaccommodating, defendants seek to recast them as mere forms development. Operating within this distorted construct, defendants focus on the process by which ISO drafts and obtains approval for insurance forms. But, contrary to defendants' characterization, this case alleges marketplace activities directed at an insurers' individual decision what coverage to offer.

Review is also inappropriate on the present undeveloped record. In support of their summary judgment motion, defendants relied upon the affidavit of Carole Banfield.[19] The Banfield affidavit merely asserts that reinsurers expressed their views on proposed coverages.[20]

[19] Defendants also submitted an appendix of state insurance statutes.

[20] At its most forceful, the affidavit states:

> ISO and the insurance regulators also discussed the proposed new forms with other interested parties, including insurers, agents, brokers, domestic

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Nothing in this affidavit, or anywhere else in the record, suggests that the various agreements and their attendant boycotts were ever submitted for regulatory review and approval in any of the states subject to the state action motion. 938 F.2d at 931, UA App. A29. Nothing in this affidavit or anywhere else in the record supports a finding that any state regulator actively supervised these activities.

Contrary to defendants' hyperbole, the decision of the court of appeals will not create a crisis in federalism. Nowhere do the complaints attack or even question the regulatory acts of state officials. Accordingly, defendants' invocation of this Court's recent decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S.Ct. 1344 (1991), is misplaced.

What plaintiffs do challenge are back-room deals, unknown and unapproved by regulators, to force unwilling companies to toe a line drawn by a handful of powerful firms. Open comment and debate are not at issue in these cases. If these boycotts are immune from antitrust scrutiny simply because state regulators see some public manifestation of the boycott, private regulation of the insurance industry by a few firms will supplant public regulation. By deterring these boycotts and forcing full and fair use of state regulatory processes, the court of appeals acted to strengthen state regulation, not to supplant it.

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> and foreign reinsurers, and corporate risk managers. The discussions were sometimes heated and the industry-wide scrutiny was intense. Banfield Afft. ¶ 9 at 5.

III. THE DECISION TO EXERCISE JURISDICTION IN THIS CASE PROPERLY APPLIES SETTLED PRINCIPLES OF INTERNATIONAL COMITY.

A. This Case Provides No Occasion to Refine the General Principle Favoring the Exercise of Jurisdiction Where American Effects are Direct, Substantial and Foreseeable.

As a general principle, "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990).[21] This strong presumption in favor of the exercise of jurisdiction may nonetheless be overcome and principles of comity may come into play where the interests of, and links to, the United States are attenuated. *Timberlane I*, 549 F.2d 613. *See also, Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 949 (D.C. Cir. 1984). Such is not the case here. The anticompetitive effects of the defendants' conduct in the United States

[21] Although *Kirkpatrick* is an act of state case, its powerful logic applies to this case as well. Moreover, its analysis stems from the same roots as the comity doctrine. *Compare* Restatement (Third) of Foreign Relations 443, comment a [The act of state doctrine has two policy bases: "deference to the executive branch and avoid[ing] disrespect for foreign states"] *with Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 612 (9th Cir. 1976) (*Timberlane I*), *after remand*, 749 F.2d 1378 (9th Cir. 1984) (*Timberlane II*), *cert. denied*, 472 U.S. 1032 (1985) ["Only respect for the role of the executive and for international notions of comity and fairness limit [the] constitutional grant" of power that enables American courts to protect Americans from foreign actions that have anticompetitive effects in the United States].

were direct, substantial and foreseeable[22]; the action of the foreign government creates no true conflict with American antitrust laws.

The lower courts have had occasion to articulate when principles of international comity require abstention from the exercise of jurisdiction.[23] *Timberlane, supra; Laker Airways, Ltd., supra; Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). These articulations derive from the venerable *Alcoa* "effects" test. *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945) (sitting by certification of this Court).[24] The minor variations in these articulations are of no moment in the present case.[25] To the contrary, a court

[22] As both courts below found, the complaints explicitly allege conduct with a "direct, substantial and reasonably foreseeable" impact on American commerce. 723 F.Supp. at 486, UA App. A73; 938 F.2d at 932, UA App. A31.

[23] *Kirkpatrick* cautions against treating such principles as "doctrines unto themselves" and thereby "expanding judicial incapacities." 493 U.S. at 409.

[24] Under *Alcoa*, "a state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *Alcoa*, 148 F.2d at 443. The conduct should, however, "significantly" or "directly" affect the United States commerce or be intended to have that effect. This Court cited *Alcoa* with approval in *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 705 (1962).

[25] Defendants argue that the court of appeals' *Timberlane* analysis was wrongly "constrained" by reference to the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a. This misstates the use to which the court of appeals put the FTAIA. Indeed, it simply concluded that its *Timberlane* analysis should be informed, but not superseded, by the "direct, substantial and foreseeable effect" standard articulated in the FTAIA. 938 F.2d at 932; UA App. A31. Thus, the

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would exercise jurisdiction over the facts of this case under any recognized comity test.[26]

The conduct challenged in this case has its principal effects in the United States. The complaints allege a complex and overlapping pattern of conspiratorial activity engaged in by both foreign and domestic actors that targeted United States markets. Initially conceived by the American domestic primary insurer defendants, the conspiratorial scheme sought to limit the number of insurance products offered to insurance consumers in the United States. Foreign and domestic reinsurers were recruited as parties necessary to guarantee that unwilling American competitors would comply with the scheme.

The integral involvement of domestic companies in the scheme to withhold reinsurance belies any notion that such activity was "wholly foreign." 938 F.2d at 932, UA App. A33. Only by ignoring the overarching American focus of the complaints can defendants represent that their motion to dismiss on comity grounds involves solely British actors in British markets. Merrett Ptn. 3-4.[27]

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court of appeals concluded: "as the [FTAIA] does not eliminate comity, a court should look to see if the case before it is one in which comity still has a role to play." *Id.*, UA App. A32. This is precisely what the court of appeals did here.

[26] The *Timberlane* balancing test employed by the court of appeals is the one most favorable to defendants. Defendants, notably, do not claim that any other circuit court of appeals would have reached a different result.

[27] The so-called "global claim" for relief in the complaints of many plaintiffs explicitly alleges that all defendants participated in a single, overarching conspiracy. Conn. Cmpt. ¶¶ 115-119, UA App. A188-A190. While the court of appeals

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Moreover, the complaints expressly allege that foreign and domestic reinsurers entered into a written agreement to use their "best endeavors to ensure that all U.S.A. and Canadian exposed insurance/reinsurance business attaching on or after 1st January, 1987, will only be written where the original business includes a seepage and pollution exclusion wherever legal and applicable." Conn. Cmpt. ¶ 112, UA App. A185-A186; Cal. Cmpt. ¶ 108, UA App. A133. This clear focus on American commerce justifies the decision of the court of appeals to exercise jurisdiction.[28]

At the very most, defendants have only raised factual disputes as to whether the conspirators were exclusively foreign nationals and whether the relevant anticompetitive conduct occurred exclusively abroad.[29] Jurisdiction

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recognized that the trial court had properly dismissed that claim on a narrow technicality of pleading, it directed the trial court on remand to allow plaintiffs an opportunity to cure that deficiency by amendment. 938 F.2d at 931, UA App. A30. Defendants' claim that those allegations were simply dismissed, Merrett Ptn. 4, n. 2, is misleading.

[28] Urging that jurisdiction be exercised, the United States as *amicus curiae* below commented that "[i]nternational comity principles do not mandate automatic deference to the domestic law or jurisdiction objections of foreign states . . . where the conduct challenged has its competitive effects principally in the United States." Brief for the United States of America as *Amicus Curiae*, at 27. In fact, the United States contended that the district court "failed to accord adequate weight to the fact that the competitive effects of the alleged conspiracy were felt primarily within the United States or to the resulting interest of the United States in enforcing its law." *Id.*

[29] No discovery preceded this Rule 12(b)(1) motion and there is no factual record beyond the face of the complaints

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should not be denied on the mere assertion of these factual disputes.

B. No Genuine Conflict Exists Between United States and United Kingdom Law.

In an attempt to counterbalance the compelling reasons for the exercise of jurisdiction, defendants claim that the British "tradition of self-regulation" creates an international conflict of sufficient scope to warrant denying jurisdiction in these cases. Defendants do not suggest that British law requires the foreign defendants to take actions forbidden by American law, that British law forbids what American law requires, nor even that compliance with American antitrust law would substantially interfere with the foreign defendants' mode of conducting business at home and within the European economic community. Merrett Ptn. 6, n. 4. They point to no inconsistency between American antitrust law and the United Kingdom's Competition Act of 1980 or Article 85(1) of the Treaty of Rome, governing competitive practices in the EEC.[30]

The supposed conflict is in reality nothing more than a dispute about the propriety of subjecting British subjects to the jurisdiction of American courts and

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that can be evaluated to conduct comity analysis. See *Timberlane I* and *Timberlane II*, *supra* (decided only after substantial discovery and on a full factual record).

[30] Defendants do not here, nor did they below, cite any statute, regulation or court decision to show that English law requires, or even acquiesces in, the conduct challenged by plaintiffs.

interfering with a British tradition of self regulation.[31] The conflict asserted is manifestly insufficient to overcome the interest of the United States in enforcing its own law.

IV. PLAINTIFFS HAVE STANDING AS CONSUMERS IN THE MARKET RESTRAINED BY THE REINSURER BOYCOTTS.

Reinsurers have filed two separate petitions[32] arguing that plaintiffs lack standing to pursue certain claims against them. Both petitions are based upon a fundamental mischaracterization of plaintiffs' complaints. To obscure plaintiffs' unquestionable standing as consumers in the market restrained by reinsurer boycotts, the petitions focus attention on activities in the reinsurance market. Plaintiffs' complaints plainly allege, however, that the reinsurers' boycotts restrained the *primary insurance* market in which the plaintiffs are consumers. Cal. Cmpt. ¶¶ 112, 117, 122 & 127, UA App. A134, A136, A137, A139; Conn. Cmpt. ¶¶ 116 & 121, UA App. A186 & A188. The

[31] Defendants have effectively asked this Court to show greater deference to the supposed regulatory interests of the United Kingdom than to the regulatory interests of one of the states of this country. If the two-pronged *Midcal* test were applied to the conduct of foreign defendants, no immunity would attach. The boycott conduct at issue here is neither permitted by British law, Pet. at 6, n.4, nor actively supervised by the British government.

[32] These are: 1. Docket No. 91-1131 (Winterthur Reinsurance Corp of America); and 2. Docket No. 91-1146 (Unionamerica Insurance Co. Ltd. et al.).

plaintiffs, thus, have standing as consumers that have been injured by the elimination of competing insurance products in this market.[33]

A. Plaintiffs Meet This Court's Test for Standing.

These petitions do not warrant review by this Court because the court of appeals decided the standing issues in these cases strictly in accordance with this Court's decisions in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (*AGC*); and *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982).

AGC involved a boycott allegedly organized by building contractors to coerce prospective developers to use nonunion contractors instead of union contractors. This Court acknowledged that both the developers and the union contractors would have had standing to challenge the boycott because "their injuries would be direct." 459 U.S. at 541.[34]

Thus, *AGC* established that those upon whom the immediate pressure of a boycott falls (developers) and

[33] Regardless of their standing as insurance purchasers, the state plaintiffs also have standing to seek injunctive relief as common law *parens patriae* on behalf of their respective citizens. *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1944). Because citizens in each state have suffered antitrust injury, even as defined by defendants in their standing petitions, nothing in this Court's opinion in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), would limit the states' *parens* authority in these cases. See *California v. American Stores Co., Inc.*, 495 U.S. 271 (1990).

[34] However, the mere employees of these victims (or the union which represents them, the plaintiff in *AGC*) would not have standing.

their suppliers (union contractors) whose goods or services have been diminished in value because of the boycott each have standing to recover antitrust damages.

This principle is fully consistent with the Court's prior decision in *McCready*. There, both the psychologists who felt the immediate pressure of a boycott and the patients who purchased the boycotted product, psychological services, had standing to sue. *McCready*, 457 U.S. at 469 n.4, 478-81. In *McCready*, the patient was considered "the direct victim of unlawful coercion." *AGC*, 459 U.S. at 540, n.44. Indeed, to the extent that there might be a difference between suppliers to the direct boycott victim (the union contractors in *AGC*) and purchasers from the direct boycott victim (the patient in *McCready*), the courts have tended to favor the latter. See P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 340.1d (1991 Supp.).

In the instant case the initial victims of the boycott are non-defendant primary insurers who were coerced by reinsurer and primary insurer defendants. Plaintiffs are purchasers of the diminished insurance products sold by the defendant primary insurers and their victims, competing, non-defendant primary insurers. Plaintiffs, thus, are in the same position as the patient in *McCready* and are in an analogous position to the union contractors in *AGC*.

B. This Case Does Not Challenge the Boundaries of Standing Doctrine.

In *AGC* this Court established a multi-factor test for standing.[35] As to the claims for damages, each petition

[35] The *AGC* factors are: the intent of the conspirators (459 U.S. at 537); the causal connection between the violation alleged and harm claimed (*id.*); the nature of plaintiffs' injury,

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advocates a different formulation of that test. Review is not warranted, however, because plaintiffs have standing under either formulation for both damages and injunctive relief.[36]

The Winterthur petition argues that plaintiffs must satisfy all of the *AGC* factors to have standing. The decision below correctly holds that plaintiffs satisfy each factor for all claims. The court of appeals noted that the "character-of-damages" factor as applied to the reinsurer-only claims presented some problems of damage allocation tending against standing for these claims. However, even as to that factor the court of appeals held that, on balance, the factor "is in favor of standing." 938 F.2d at 926, UA App. A20.

Furthermore, the global conspiracy claim[37] overcomes any "character-of-damages" concerns. Under the

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i.e., antitrust injury (*id.* at 538); the directness or indirectness of the claimed injury in the chain of causation (*id.* at 540-541); existence of a better class of plaintiffs (*id.* at 542); and whether the damages claimed are either speculative in terms of causation or duplicative (*id.* at 542-545).

[36] *Cargill* recognizes important differences between damages and injunctive remedies and holds that "some" *AGC* factors "are not relevant under § 16," i.e. factors addressing multiple lawsuits and duplicative recoveries. *Cargill*, 479 U.S. at 111 n.6.

[37] The Unionamerica petition does not challenge plaintiffs' standing under the global conspiracy claim, but misleadingly refers to it as "dismissed." UA Ptn. 6-7, n.6. The court of appeals granted plaintiffs leave to amend that claim to cure technical problems. See n.27, *supra*. The Winterthur petition concedes the continued vitality of the claim, but apparently contends that the Court should ignore direct purchases from coconspirators and deny standing. Winterthur Ptn. 20 n.8.

global claim, the reinsurers are coconspirators of the defendant primary insurers from which plaintiffs made direct purchases. *See Arizona v. Shamrock Foods*, 729 F.2d 1208 (9th Cir.), *cert. denied*, 467 U.S. 1252 (1984); *Fontana Aviation v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980). When a plaintiff purchases directly from a named coconspirator of an antitrust violator, none of the policy concerns of *Illinois Brick*[38] are implicated. P. Areeda & H. Hovenkamp, *Antitrust Law* § 337.2e (1991 Supp.). Any issues of duplicative liability and allocation can be resolved because all potentially conflicting claimants are joined in the litigation. In light of plaintiffs' standing to sue defendants under the global claim, a fragmented review of the reinsurance-only claims would be premature and potentially futile.

The Unionamerica petition argues that "directness" and "the nature of the injury" are separate and independent limitations on standing. Because the court of appeals correctly held that plaintiffs satisfied both requirements, consideration of this question should await a case in which one of the two elements, and, therefore, the outcome of the case, is in doubt.

C. Plaintiffs Suffered Distinct Injuries.

Defendants' suggestion that the damages sought by the plaintiffs in these cases are either speculative or duplicative is simply without merit. The speculativeness referred to in *AGC* only relates to causation of injury and not to its quantification. *AGC*, 459 U.S. at 542 ("the

[38] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

alleged effects on the Union may have been produced by independent factors").

The danger of duplicative recoveries does not exist here. This is not a passing-on case where there will be "conflicting claims to a common fund," *id.* at 544, that might give rise to concerns similar to those in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The boycotts in these cases give rise to two types of injury that are suffered by distinct and different classes of potential plaintiffs. The plaintiffs currently before the Court were injured by the product output restrictions and the overcharges that flowed from the violation. The competing, non-defendant primary insurers were injured by the enforcement effects of defendants' cartel. Each class of potential plaintiffs suffered distinct and separable injuries. Indeed, this Court's decisions in both *AGC* and *McCready* expressly recognized the separate standing of different classes of plaintiffs for each of these types of injuries.

No court has ever held that it would be duplicative to allow standing for the victims of violations which also cause actionable injury to defendants' competitors. Such a holding would limit standing to competitors in a wide variety of cases. Such a holding would, for example, deny standing to consumers who pay the overcharges imposed by a monopolist that unlawfully excludes competitors from the market.

Defendants have not offered this Court any principled basis for denying standing to the consumers of cartellized insurance products in this case. Thus, they have not provided any basis for review of the decision of the court of appeals.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

DATED this 14th day of February, 1992

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No. 91-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, THREE QUAYS UNDERWRITING MANAGEMENT LIMITED, JANSON GREEN MANAGEMENT LIMITED, MURRAY LAWRENCE & PARTNERS, D.P. MANN UNDERWRITING AGENCY LIMITED, ROBIN A.G. JACKSON, PETER N. MILLER, EDWARDS & PAYNE (UNDERWRITING AGENCIES) LIMITED, and STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 91-1128

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OCTOBER TERM, 1991

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Petitioners Merrett Underwriting Agency Management Limited, Three Quays Underwriting Management Limited, Janson Green Management Limited, Murray Lawrence & Partners, D.P. Mann Underwriting Agency Limited, Robin A.G. Jackson, Peter N. Miller, Edwards & Payne (Underwriting Agencies) Limited, and Sturge Reinsurance Syndicate Management Limited respectfully submit this reply brief in support of their petition for a writ of certiorari.

Plaintiffs-Respondents do not controvert any of the reasons advanced by petitioners why the writ should be granted. Plaintiffs do not dispute that "(t)his Court has never addressed the question whether and to what extent the extraterritorial reach of this nation's

economic regulatory laws is restrained by considerations of international law and comity." *Petition* at 3. Nor do Plaintiffs disagree that "(t)his Court has stressed that Americans courts should weigh the interests of foreign nations carefully before approving or embarking on a course of action likely to cause a conflict with foreign law." *Petition* at 20. Plaintiffs do not even controvert that this case presents an unprecedented expansion of American jurisdiction that would supplant the considered policies, interests and traditions of a foreign sovereign. *Petition* at 18-19.

Instead, plaintiffs rely on a "global conspiracy" theory whose rejection by the district court was upheld by the Ninth Circuit. Plaintiffs also contend that application of the U.S. antitrust laws to the London reinsurance market as envisioned by the claims at issue would raise no conflict with British law and policy, even though both courts below agreed with the British government that a substantial conflict would arise from the assertion of jurisdiction in this case. Finally, plaintiffs rely on the opinion of this Court in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990), an inapposite case the court below rightly saw no need to reference.

ARGUMENT

I. Plaintiffs' Dismissed Global Conspiracy Claim is No Answer to the Compelling Reasons to Grant the Writ

Plaintiffs defend the assertion of jurisdiction over three claims that name only foreign defendants and charge only foreign conduct on the spurious ground that allegations in other claims about conduct by other groups of defendants support the exercise of such jurisdiction. Plaintiffs acknowledge that "principles of international comity [can] require abstention from the exercise of jurisdiction." *Respondents' Consolidated Brief in Opposition to Petitions for Writs of Certiorari* ("*Respondents' Br.*") at 21. Plaintiffs argue, however, that "under any recognized comity test," jurisdiction is proper in this case because of the supposedly "overarching American focus of the complaints" reflected by allegations of "a complex and overlapping pattern of conspiratorial activity" involving both foreign and domestic defendants. *Respondents' Br.* at 22.

The comity issue, however, emanates solely from the three discrete claims in the complaints that name only British defendants and allege material conduct occurring entirely in England. As far as these counts are concerned, there are no factual allegations anywhere in any of the complaints that support the reference in plaintiffs' brief to the supposed "integral involvement of domestic companies in the scheme to withhold reinsurance." *Respondents' Br.* at 22. Plaintiffs rest their opposition to the petition on this ground because they are otherwise unable to defend the Court of Appeals' decision.

There is no "dispute" about the nationality of the defendants or the locus of the challenged conduct.[1] *Respondents' Br.* at 23. The complaints speak for themselves: all the defendants in the relevant claims are English, and all material conduct happened in England. It is precisely these features of the London reinsurance claims that make this case a compelling vehicle for this Court to consider the extraterritorial reach of this nation's economic regulatory laws.

II. Plaintiffs' Claim That the Complaints Would Raise No Conflict with British Law Contradicts the Findings of Both Courts Below as well as the Views of the British Government

Although plaintiffs say that this case does not involve a "genuine conflict" with foreign law or policy, both courts below found to the contrary. A-29, 75. In its brief as *amicus curiae* before this Court, the British government has now reiterated to this Court what it told the Ninth Circuit, and what that Court accepted (A-29): "[T]o subject British nationals to substantial legal liability for conduct in London which the District Court properly found was "conducted in conformity with English law. . . .. [for] a legitimate business purpose" would raise a substantial conflict with British law and policy. *Brief of the Government of the United Kingdom of Great Britain and*

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[1] Plaintiffs are in no position to raise factual disputes as to the nationality of the defendants or the locus of the challenged conduct. They had every opportunity to undertake discovery in opposition to the motions to dismiss. A-78.

Northern Ireland as Amicus Curiae in Support of Petitioners at 9.[2]

Plaintiffs contend that petitioners "have effectively asked this Court to show greater deference to the supposed regulatory interests of the United Kingdom than to the regulatory interests of one of the states of this country." *Respondents' Br.* at 25 n.31. Indeed, petitioners submit, and this Court has so held in other contexts, that greater respect is due to the interests of a foreign sovereign than to the interests of states in the federal union, precisely because different considerations and different relationships are at stake in the international context. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) ("concerns of international comity" require enforcement of agreement to arbitrate antitrust dispute arising out of international contract, "even assuming that a contrary result would be forthcoming in a domestic context"). Under the Supremacy and Commerce Clauses, Congress may, of course, override state interests when it sees fit. Neither Congress nor the courts have comparable authority under international law to override the interests of foreign nations.

III. Plaintiffs' Reliance on the W.S. Kirkpatrick Case is Misplaced

Plaintiffs say that the "powerful logic" of this Court's opinion in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990), controls this case. *Respondents' Br.* at 20 n.21 and 21 n.23. *Kirkpatrick* involved an attempt to expand the act of state doctrine in order to shield corrupt defendants. The case in no way involved international law. 493 U.S. at 404-05. By contrast, the petition herein expressly involves international law, *i.e.*, the principle of reasonableness in the exercise of jurisdiction. *See* §§ 402 and 403 of the *Restatement (Third) of the Foreign Relations Law of the United States* (*see*

[2] Plaintiffs are incorrect in asserting that British law does not permit the challenged conduct. *Respondents' Br.* at 24 n.30. The *Restrictive Trade Practices (Services) Order* 1976, S.I. 1976 No. 98, Schedule ¶ 8 (*see Petition* at 6 n.4), cited by the district court (A-73), has the force of law.

Petition at 15-16), and comment a to § 403. *Kirkpatrick*'s logic thus has scant, if any application in this case.

Kirkpatrick is relevant in one sense, however. There, the Court seized the opportunity to clarify the jurisdiction of American courts in cases charging illegal conduct by Americans abroad.[3] This case is bigger and more important than *Kirkpatrick* in every way: it represents a challenge to an entire industry centered and regulated abroad that results in conflict with the laws and policies of a foreign sovereign.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[3] The facts in *Kirkpatrick* did not implicate principles of comity. Plaintiff in *Kirkpatrick* alleged that its U.S. competitor won a Nigerian Air Force contract by bribing Nigerian government officials. Not only had two of the U.S. defendants already pleaded guilty to violating the Foreign Corrupt Practices Act, it was undisputed that the conduct at issue violated Nigerian law as well. 493 U.S. at 402. There was thus no possibility of conflict with foreign law or policy.

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IN THE

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OCTOBER TERM, 1991

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, THREE QUAYS UNDERWRITING MANAGEMENT LIMITED, JANSON GREEN MANAGEMENT LIMITED, MURRAY LAWRENCE & PARTNERS, D.P. MANN UNDERWRITING AGENCY LIMITED, ROBIN A.G. JACKSON, PETER N. MILLER, EDWARDS & PAYNE (UNDERWRITING AGENCIES) LIMITED, and STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED, *Petitioners*,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Having obtained the written consent of the parties pursuant to Rule 37.2 of the Rules of this Court,[1] the Government of the United Kingdom of Great Britain and Northern Ireland ("British Government") submits this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by the London reinsurer defendants and the Response filed by other British co-defendants[2] in support of that petition.

INTEREST OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

The British Government has a substantial interest in expressing to the Court its views with respect to this proceeding. The direct focus of the three claims under the United States antitrust laws to which the petition for a writ of certiorari and this *amicus* brief pertain is business activity by British citizens within the London reinsurance and retrocessional insurance markets. Moreover, the plaintiffs' requested relief contemplates injunctions restricting certain conduct in London by the British defendants and, where applicable, their U.S. parents, as well as treble damages.

It is undisputed that British legislation contains extensive provisions regulating the conduct of this same insurance business. As the District Court correctly pointed out, the subject of the three antitrust claims at issue in this petition exists "in a regulatory and competitive framework established by the British Government." 723 F. Supp. 464, 488 (N.D. Cal. 1989). The Court of Appeals, like the District Court, acknowledged that, therefore, application of the U.S. antitrust laws to the London reinsurance market based on the claims at issue here would lead to significant conflict with English law and policy. 938 F.2d 919, 933 (9th Cir. 1991).

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[1] The consents are filed contemporaneously with this brief.

[2] Those co-defendants are petitioners in petition No. 91-1146.

Nonetheless, the Court of Appeals concluded that comity did not require abstention from the exercise of subject matter jurisdiction over the claims.

It has long been the policy of the British Government to cooperate with the U.S. Government and the U.S. courts in civil and commercial matters involving conduct deemed to be improper under the laws of both countries. Unfortunately, however, the assertion of certain claims of extraterritorial jurisdiction in antitrust proceedings in the United States has, from time to time, given rise to significant disagreements between U.S. antitrust claimants, on the one hand, and the British authorities, on the other.

In 1978, the Department of State, at the suggestion of the Clerk of this Court,[3] encouraged foreign governments to present their views directly to U.S. courts.[4] Since then, friendly foreign governments have relied on the State Department's position and have presented their views directly to this and other relevant U.S. courts.

This *amicus* brief is submitted to inform this Court of the British Government's views and to support the London reinsurer defendants' request for review. Conduct in the London reinsurance market is for the British Government to regulate. The decision of the court below constitutes an interference with the sovereign rights and interests of the British Government and is, with all due

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[3] Letter from Solicitor General McCree to Legal Adviser Hansell (May 2, 1978), *printed in* Dep't of State, 1978 *Digest of United States Practice in International Law* 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 125 (1979).

[4] Dept. of State Circular Diplomatic Note to Chiefs of Mission in Washington, D.C. (Aug. 17, 1978), *reprinted in* Dep't of State, 1978 *Digest of United States Practice in International Law* 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 124 (1979). *See also* Letter from Deputy Legal Adviser Marks (June 15, 1979), *described in* 73 Am. J. Int'l L. 669, 678-79 (1979).

respect, both erroneous and damaging to the principles of international law and comity to which this Court has accorded great significance in the past.

STATEMENT OF THE CASE

The complete background of this proceeding has been briefed by the parties. This *amicus* brief addresses solely the jurisdictional issues relevant to the British defendants which are raised in the petition for a writ of certiorari filed on behalf of Merrett Underwriting Agency Management Limited *et al.*

As the District Court observed, the following allegations of the complaints in these antitrust cases [5] are relevant to activity by British citizens in the United Kingdom: The Fifth Claim alleges that the defendant London reinsurers agreed to restrict the terms on which reinsurance would be written and to refuse to reinsure certain risks. The Sixth Claim alleges that, at a meeting in London, the British defendants agreed that all North American casualty reinsurance treaties would be written with a pollution exclusion. The Eighth Claim alleges that in 1987 a group of London retrocessional reinsurers agreed to boycott retrocessional reinsurance treaties that included certain North American property risks unless the original insurance contained certain exclusions. 723 F. Supp. at 484-85.

The District Court held that the longstanding practices in the London reinsurance market challenged by the complaints were "openly conducted in conformity with English law" and were "directed primarily at reducing [the British defendants'] exposure to certain risks and

[5] For the purpose of convenience, reference will be made herein to the Fifth, Sixth and Eighth claims of the "California-style" complaints, which are the Third, Fourth and Fifth claims of the "Connecticut-style" complaints. *Amicus*' statements apply as well to the corresponding claims in other complaints including those brought by private plaintiffs.

controlling losses, a legitimate business purpose." 723 F. Supp. at 488, 490.

Applying the three-part test of subject matter jurisdiction laid down by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613-14 (9th Cir. 1976) ("*Timberlane I*"), *after remand* 749 F.2d 1378, 1382-83 (9th Cir. 1984) ("*Timberlane II*"), *cert. denied*, 472 U.S. 1032 (1985), the District Court concluded that the plaintiffs' allegations did not satisfy the international comity requirements of the test because:

> [E]nforcement of the antitrust laws against activities in the London reinsurance market would lead to significant conflict with English law and policy. This conflict, unless outweighed by other factors in the comity analysis, is itself a sufficient reason to decline exercise of jurisdiction. *Timberlane II*, 749 F.2d at 1384.
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> * * * *
>
> The foregoing analysis leads to the conclusion that the conflict with English law and policy which would result from the extraterritorial application of the antitrust laws in this case is not outweighed by other factors. Although the conduct complained of had effects within the United States, it is not alleged to have excluded competitors from markets or denied consumers access to markets, and it is not alleged to have occurred for that purpose.

723 F. Supp. at 489-90.

Accordingly, the District Court dismissed these claims against the British defendants for lack of subject matter jurisdiction.

On plaintiffs' appeal, a panel of the Court of Appeals for the Ninth Circuit reversed the District Court in this regard, as well as on other issues.[6] In assessing whether

[6] The British Government filed in the court below an *amicus curiae* brief, as well as a brief in support of the London reinsurer defendants' petition for rehearing and suggestion for rehearing en banc.

international comity precludes exercise by the U.S. courts of subject matter jurisdiction over the aforementioned Fifth, Sixth and Eighth claims, the panel opinion reasoned that the enactment of the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1988) ("FTAIA") had a profound effect on the *Timberlane* comity test, as follows:

> . . . We do not believe a *Timberlane* analysis (see *infra*) can be unaffected by the statute. If a complaint survives the new bar of 15 U.S.C. § 6a because the conduct has "a direct, substantial, and reasonable [sic] foreseeable effect" on American commerce, it is only in an unusual case that comity will require abstention from the exercise of jurisdiction. But as the legislation does not eliminate comity, a court should look to see if the case before it is one in which comity still has a role to play.

938 F.2d at 932.

The opinion then conducted the *Timberlane* evaluation, and, as to the degree of conflict with foreign law or policy, determined:

> . . . The district court found that application of the antitrust laws to the London reinsurance market "would lead to significant conflict with English law and policy . . . ." The British [Government's *amicus curiae*] brief reiterates that conclusion; we do not doubt its accuracy. Such a conflict, unless outweighed by other factors, would by itself be reason to decline exercise of jurisdiction. *Timberlane Lumber Co. v. Bank of America*, 749 F.2d 1378, 1384 (9th Cir. 1984) (*Timberlane II*), *cert. denied*, 472 U.S. 1032 (1985).

938 F.2d at 933.

However, after evaluating five of the six[7] other factors of the *Timberlane* test, the panel concluded that the only consideration pointing toward abstention was the conflict with British policy and that this was insufficient to overcome "the weight of the findings already made under the Foreign Trade Antitrust Improvements Act." 923 F.2d at 934.

[7] Without explanation, the panel did not consider the seventh *Timberlane I* factor, *i.e.*, "the relative importance to the violations charged of conduct within the United States as compared with conduct abroad." 549 F.2d at 614.

ARGUMENT

I. INTRODUCTION

This case raises important questions relating to mutual respect between friendly nations and deference to principles of international law and comity. The decision of the Court of Appeals ignores those principles and the weight which this Court has attached to them in numerous opinions. The British Government urges the Court to grant the petition and reverse the decision below. It asks the Court to rule that, consistently with the demands of international law and comity, the U.S. courts should not exercise subject matter jurisdiction over the antitrust claims in this case directed against the British insurance and reinsurance industry with respect to business activity conducted in London in the context of the British Government's regulatory and competition regime.

II. THE DECISION OF THE COURT BELOW DISREGARDS THE BRITISH GOVERNMENT'S REGULATION OF THE LONDON REINSURANCE MARKET AND AUTHORIZES AN EXERCISE OF U.S. JURISDICTION WHICH SEVERELY CONFLICTS WITH BRITISH LAW AND POLICY

As both of the courts below recognized, the London reinsurance and retrocessional insurance businesses are carried on in a framework established by the British Government. The United Kingdom has a long-standing, sophisticated system of insurance regulation. The relevant legislation contains extensive provisions regulating the conduct of the insurance business. In particular, the Insurance Companies Act of 1982 requires that, with certain exceptions, all companies wishing to carry on insurance business in the United Kingdom must be author-

ized by the Department of Trade and Industry. Companies must have adequate initial capital and be managed by fit and proper persons. All authorized insurance companies are required to make regular financial returns to the Department of Trade and Industry. These returns must show that the companies meet the minimum margin of solvency as laid down in the European Community Life and Non-Life Insurance Establishment Directives and that they have reserves adequate to cover their expected liabilities.

That Act also contains provisions relating to the conduct of insurance business by members of the Society of Lloyd's, the detailed regulation of which is governed by the Lloyd's Acts 1871-1982.

As does the United States, the United Kingdom has certain competition law exemptions for insurance. The District Court referred to the exemption from the Restrictive Trade Practices Act of 1976[8] given to certain (but not all) agreements relating to insurance services by the Restrictive Trade Practice (Services) Order 1976[9] 723 F. Supp. at 488. However, the conduct of insurance business is not immune from investigation under U.K. competition laws. It is for the United Kingdom to determine how and when such laws apply. The conduct of insurance business may be investigated under the Fair Trading Act 1973 and the Competition Act 1980. These laws provide for the reference and investigation of practices following which, if there are findings adverse to the public interest, the Secretary of State has powers to make remedial orders.[10] Mergers of insurance companies are subject to the merger control rules in the Fair Trading Act.[11] In addition, any change of control of an authorized insurance company requires the approval of the Secretary of State under the Insurance Companies Act of 1982.

Given this framework and the British Government's obvious legitimate interest in the stability and reliability of the reinsurance market in its territory, the conflict in this case arises because plaintiffs ask the U.S. courts to place restrictions on the British industry which is operating under the British regulatory and competition regime and also to subject British nationals to substantial legal liability for conduct in London which the District Court properly found was "conducted in conformity with English law . . . [for] a legitimate business purpose." 723 F. Supp. at 488, 490. The Court of Appeals itself noted the existence of the conflict. 938 F.2d at 933.

The British scheme of regulation, including its competition policy aspects, has its origins in the history of the British insurance industry and of British competition policy, and the way in which the British Parliament has thought fit to legislate on both aspects over the years. It is for the British Parliament in the light of developments, *e.g.*, in the U.K. insurance industry, to decide whether to change the system.[12] It would be inappropriate for the U.S. courts to do so.

The U.S. Government has chosen a regulatory regime for the insurance business that involves substantial con-

[8] The 1976 Act consolidated earlier enactments relating to restrictive trade practices.

[9] S.I. 1976 No. 98.

[10] Under the Competition Act there is also the possibility of the Director General of Fair Trading obtaining remedial undertakings. Under the Fair Trading Act undertakings may be given to the Minister.

[11] The EEC Merger Control Regulation may also be applicable. Council Regulation (EEC) No. 4064/89, 32 O.J. EUR. COMM. (No. L 395) 1 (1989).

[12] Some changes flow from British membership of the European Community. That is quite different from the order of a U.S. court applying extraterritorially U.S. legislation in whose formulation the British Government played no part, and to whose jurisdiction it has not assented.

trol by state governments and an exemption from the federal antitrust laws. An assertion by an English court of a right to order restraints on the operation of the U.S. regime based on concepts of English law surely would be deemed by U.S. courts to be unreasonable and to create a conflict with U.S. law and policy. It is no wonder therefore that the assertion of jurisdiction by the U.S. courts here is viewed by the British Government as constituting an offensive interference with its sovereign rights and significant interests.

III. DISMISSAL OF THE SUBJECT CLAIMS IS REQUIRED BY INTERNATIONAL AND UNITED STATES LAW

It is well established that rules of international law are part of the law of the United States, and that U.S. courts are bound to give effect to international law. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Restatement (Third) of the Foreign Relations Law of the United States* § 111 (1987) [hereinafter cited as "*Restatement (Third)*"]; Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1561-67 (1984). International law limits the authority of nations to assert jurisdiction over matters affecting the interests of other nations.

In particular, personal jurisdiction over a foreign entity by reason of business contacts with a state does not give that state general jurisdiction over all of the activities of that entity anywhere in the world, particularly when the exercise of jurisdiction is inconsistent with the law of the other state where the foreign entity is a citizen and is located.

In recognition of well established principles, the U.S. and U.K. Governments, as well as other Member States of the Organization for Economic Cooperation and Development ("OECD"), have agreed to avoid or minimize conflicts with foreign laws, policies or interests by following an approach of "moderation and restraint, respecting and accommodating the interests of other Member Countries." OECD *Minimizing Conflicting Requirements: Approaches of "Moderation and Restraint"* 7 (1987). Moreover, in a recent executive agreement[13] the Executive Branch of the U.S. Government recognized that the important interests of the other Party "would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities."[14] Both lower Courts have agreed that such antecedent British Government laws and policy statements exist in this case.

Under international law and the principles of moderation and restraint as they have been applied in U.S. courts, the extraterritorial exercise of a U.S. court's jurisdiction to prescribe or enforce must always be reasonable. A state "may not exercise jurisdiction" when to do so would be unreasonable, after evaluating and balancing all of the relevant factors. *Restatement (Third)* §§ 403, 431.

Assuming that the standard of the FTAIA applies here,[15] the Court of Appeals' view based on the FTAIA that, once the requisite effect on U.S. commerce is established, "it is only in an unusual case that comity will require abstention from the exercise of jurisdiction," misconstrues the FTAIA.

Such a reading of the FTAIA is unsupported and is contrary to the statute's legislative history quoted in

[13] Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws. The Agreement is reprinted in 30 I.L.M. 1491 (1991).

[14] *Id.* at Art. VI(1).

[15] For a discussion of the point that the FTAIA applies only to restraints affecting U.S. *export* commerce, see the Petition of Merrett Underwriting Agency Management Ltd. *et al.* at 22-23.

part by the Court of Appeals, 938 F.2d at 932, which expressly preserved the full vitality of the *Timberlane* principle:

> If a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts' ability to employ notions of comity, *see, e.g., Timberlane Lumber Co. v. Bank of America*, 549 F.2d 1287 (3d Dis. [sic: 9th Cir.] 1979 [sic: 1976]), or otherwise take account of the international character of the transaction. H.R. Rep. No. 97-686 at 13 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 2431, 2498.

In the FTAIA Congress defined the degree of effect on U.S. commerce that is sufficient to permit a court to assert jurisdiction as one which is "direct, substantial and reasonably foreseeable." If the plaintiff fails to meet its burden of proving that the challenged conduct has such a requisite effect on U.S. commerce, the complaint must be dismissed.[16] On the other hand, even where the requisite effect does exist, Congress intended that the court be free to take account of the international aspects of the case in whatever manner it deems appropriate, *e.g.*, the factors listed in *Timberlane I.*

Since the issuance by the Congress of this guidance with respect to the 1982 FTAIA, this Court has stressed in several other contexts the need for adherence by the United States authorities and courts to the basic standards of international law and comity. *See, e.g., Société Nationale Industrielle Aérospatiale v. U.S. District Court*,

[16] The *Timberlane II* court twice stated that the plaintiff, Timberlane, had failed to carry its burden of persuasion on particular factors. 749 F.2d at 1385. In *Star-Kist Foods, Inc. v. P.J. Rhodes & Co.*, 769 F.2d 1393 (9th Cir. 1985), the Court of Appeals for the Ninth Circuit held that, although the first two requirements of the *Timberlane* test arguably were satisfied, with respect to the international comity element the proponent of extraterritorial application "*has not established* that the interests of and links to American foreign commerce are sufficient to justify the extraterritorial application of the Lanham Act." *Id.* at 1395 (emphasis added).

482 U.S. 522, 535 (1987) ("the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation"); *Doe v. United States*, 487 U.S. 201, 218, n.16 (1988) ("we are not unaware of the international comity questions implicated by the Government's attempts to overcome protections afforded by the laws of another nation"); and *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 115 (1987) ("a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case" is required.).

This teaching of the Court that the U.S. courts must demonstrate special sensitivity to the legitimate and important interests of foreign nations was ignored by the Court of Appeals. That Court plainly gave inadequate weight to its own finding that the exercise of jurisdiction here would conflict with British law and policy.

The Court of Appeals also erred in holding that the second *Timberlane* factor, i.e., "The nationality or allegiance of the Parties. . . .," pointed towards the exercise of jurisdiction because "the interests of Britain are at least diminished where the parties are subsidiaries of American corporations." 938 F.2d at 933. This holding is contrary to well established principles of international and U.S. law which provide that, regardless of its ownership, a corporation is a national of the country under the laws of which it is organized. *See, e.g., Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 n.11 (1982); *Barcelona Traction (Belgium v. Spain)*, [1970] I.C.J. Rep. 3; *Restatement (Third)* § 213.

Finally, the Court of Appeals also erred by not considering the seventh *Timberlane* factor, *i.e.*, "the relative importance to the violations charged of conduct within the United States, as compared with conduct abroad." 549 F.2d 614. The District Court held that as to two of the three claims at issue here (the Sixth and Eighth),

no challenged conduct was alleged to have occurred within the United States. It also held that the alleged conduct in the United States relating to the remaining claim relevant here (the Fifth) was incidental to alleged agreements in London among the defendants. 723 F.Supp. at 490. The unexplained failure of the Court of Appeals to consider the seventh *Timberlane* factor obviously negates its holding that only the conceded conflict with British law weighed in favor of abstention from exercising jurisdiction.

In sum, in the view of the British Government, it is important for this and future cases that the decision of the court below not be allowed to stand. *Amicus* urges that the petition for a writ of certiorari should be granted so that the principles of international law and comity may be given their correct application in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Nos. 91-1111, 91-1128, 91-1131, and 91-1146

In the Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., ET AL.; MERRETT UNDERWRITING AGENCY MANAGEMENT LTD., ET AL.; WINTERTHUR REINSURANCE CORP. OF AMERICA; AND UNIONAMERICA INSURANCE COMPANY LTD., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether domestic insurance companies forfeited their antitrust immunity under the McCarran-Ferguson Act by allegedly conspiring with foreign reinsurers that are not subject to regulation by the States.

2. Whether petitioners' alleged activities constituted a boycott for purposes of the McCarran-Ferguson Act, 15 U.S.C. 1011-1015.

3. Whether petitioners' alleged activities are exempt from the antitrust laws under the state action doctrine.

4. Whether respondents have antitrust standing.

5. Whether principles of comity require the dismissal of certain claims against the foreign reinsurers.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Respondents—19 States and numerous private parties—brought these consolidated actions against several primary insurers, reinsurers, insurance underwriters and brokers, and two insurance associations. Respondents allege that petitioners violated the federal antitrust laws, as well as state laws, by engaging in a conspiracy to coerce other insurance companies to alter the terms on which they sell insurance.

1. a. Commercial general liability (CGL) insurance protects the insured against the risk of liability to third parties for personal injuries or property damage. "Pri-

mary" insurers (including petitioners Hartford Fire Insurance Co., Allstate Insurance Co., Aetna Casualty and Surety Co., and CIGNA Corporation) sell CGL insurance to businesses, nonprofit organizations, and government entities. Pet. App. A13.[1]

"Reinsurers" sell insurance to insurers. ("Retrocessional" insurance is insurance for reinsurers. Pet. App. A13.) Primary insurers purchase reinsurance through a network of specialized insurance brokers and underwriters, many of whom do business through Lloyd's of London. The reinsurers' participation in CGL insurance protects the primary insurance companies against catastrophic losses. In addition, primary insurers that "cede" some of the risks they underwrite to reinsurers are freed from the obligation to maintain large reserves against those risks, and thus are able to sell more insurance. Petitioners include domestic reinsurers, such as General Reinsurance Corp. and Winterthur Reinsurance Corp. of America; foreign reinsurers, including six reinsurers known collectively as the "London Company Market" corporations; and several insurance brokers. Pet. App. A13-A14, A116.

Defendant Insurance Services Office (ISO) is an association of more than 1,400 property and casualty insurers that develops standard forms of insurance policies, collects data, and estimates insurance risks. ISO also presents the standard forms to state insurance officials for approval. CGL insurance is written primarily on standard forms developed by ISO. Defendant Reinsurance Association of America is primarily a lobbying organization. Pet. App. A14.

b. For many years, primary insurers sold CGL insurance primarily on an "occurrence" basis. An "occurrence" policy protects the insured against occurrences of liability during the life of the policy, regardless of when a claim is filed. Occurrence insurance has a "long tail"—*i.e.*,

[1] Unless otherwise noted, "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari in No. 91-1146 (the Unionamerica Petition).

claims may be filed against the insurance company long after the policy has expired. Pet. App. A14.

Respondents allege that the defendant primary insurers undertook a campaign to end sales of CGL insurance on an occurrence basis, and to substitute "claims-made" insurance. A "claims-made" policy, as its name suggests, provides protection only against claims that are made during the life of the policy. In addition to substituting "claims-made" CGL insurance for "occurrence" insurance, respondents allege that the defendant primary insurers sought to (1) include in claims-made policies a "retroactive date" provision that cuts off coverage for occurrences prior to the retroactive date, even if a claim is filed during the life of the policy, (2) exclude from CGL coverage "sudden and accidental" pollution coverage, and (3) limit coverage of legal defense costs. Pet. App. A14, A121-A122.

Respondents allege that other primary insurers and ISO did not agree to these changes. Instead, in 1984 ISO issued standard CGL policy forms for both occurrence and claims-made insurance. ISO's claims-made policy did not include a retroactive date provision. In addition, both types of ISO policies covered sudden and accidental pollution damages and legal defense costs. Pet. App. A122.

Respondents allege that the defendant primary insurers, unsatisfied with this state of affairs, took steps to coerce recalcitrant competitors to accept the proposed restrictions on CGL coverage. To achieve their goal, the defendant primary insurers allegedly enlisted the assistance of domestic and foreign reinsurers. The conspirators allegedly agreed that the reinsurers would refuse to reinsure any CGL risks on the disputed ISO forms until ISO (1) eliminated the CGL occurrence form, (2) excluded pollution liability coverage from its CGL forms, (3) added a retroactive date to the claims-made form, and (4) limited coverage of defense costs. Pet. App. A15, A123-A127.

Respondents allege that petitioners' scheme was successful. ISO withdrew the 1984 forms and replaced them with forms that excluded pollution coverage and included

a retroactive date provision. Under continuing pressure from the London reinsurers, ISO later withdrew statistical and actuarial support for CGL occurrence forms. Without ISO's support, respondents allege, primary insurers were no longer able to write occurrence insurance. Pet. App. A15, A126-A133.

In 1985, petitioners successfully urged ISO to develop standardized forms of "excess" and "umbrella" insurance that contained a retroactive date, a pollution exclusion, and limits on defense costs. The effect of these modifications was to ensure that consumers could not obtain the disputed types of insurance coverage by purchasing excess or umbrella insurance. Pet. App. A131-A132, A144-A145.

2. The district court dismissed the complaints. Pet. App. A36-A86. It concluded that the challenged conduct was part of the "business of insurance," and therefore immune from the federal antitrust laws under the McCarran-Ferguson Act, 15 U.S.C. 1011-1015. Pet. App. A47-A49. The court held that petitioners' alleged conduct was not within the "boycott" exception to the McCarran-Ferguson immunity, because respondents had not alleged a refusal to deal on any terms or "conduct which goes beyond the making and implementation of agreements to do business only on terms acceptable to the participant." *Id.* at A58.

The district court also held that petitioners were immune under the state action doctrine to the extent that respondents' allegations concern activities related to the development of standard CGL forms. The court found that the States had authorized collective development of insurance forms and had approved the more restrictive CGL forms favored by petitioners. Pet. App. A59-A63.

The court rejected petitioners' contentions that respondents lacked antitrust standing, and that respondents had not alleged a sufficiently direct impact on United States commerce to satisfy the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a. Pet. App. A65-A67, A73-A82. Relying on principles of international comity set forth in *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), however, the court dismissed three claims directed solely at the London reinsurers (Counts 5, 6, and 8 of the California complaint). The court concluded that application of the federal antitrust laws to those claims would lead to a significant conflict with English law and policy. Pet. App. A69-A82.

Because the district court dismissed all the federal claims, it also dismissed the pendent state law claims. Pet. App. A83.

3. The court of appeals reversed. Pet. App. A1-A35. The court held that petitioners had not demonstrated that they were entitled to immunity under the McCarran-Ferguson Act for two independent reasons. First, because the States have no power to regulate reinsurance contracts entered into in foreign nations, the court concluded that unregulated activities with which the defendants were charged fall outside the scope of the McCarran-Ferguson Act. Pet. App. A22-A24. The court further concluded that the domestic defendants forfeited their McCarran-Ferguson immunity "when they conspired with the foreign defendants." *Id.* at A24.

Second, the court held that petitioners' alleged conduct is within the boycott exception to McCarran-Ferguson immunity. The court emphasized respondents' allegations that the insurers "enlisted the reinsurers to compel capitulation by ISO and the insurers who had refused to go along with the Hartford demands." Pet. App. A26. This, the court held, alleges a McCarran-Ferguson Act boycott. The court rejected the district court's suggestion that the boycott exception applies only to an absolute refusal to deal on any terms. It explained that "[t]he evil of a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms." *Id.* at A27.

The court of appeals also reversed the district court's state action ruling. Pet. App. A29-A30. The court explained that the anticompetitive conduct at issue is the alleged boycott, and there is no evidence that any State

authorized or actively supervised the boycott. The court held that the States' approval of the ISO forms was not sufficient to confer state action immunity on the boycott, because "state approval of one activity is not state approval of a related but distinct activity." *Id.* at A29.

The court of appeals agreed with the district court that respondents have antitrust standing against all petitioners and that the FTAIA does not bar any of respondents' claims. Pet. App. A19-A21, A30-A31. But the court of appeals, unlike the district court, concluded that comity was not a bar to respondents' claims against the London reinsurers. *Id.* at A30-A35. In applying the balancing analysis of its *Timberlane* decision, the court of appeals concluded that "[a] single factor points toward abstention: the conflict with a long-established British policy towards * * * the underwriting of insurance." *Id.* at A35. But the court concluded that "[e]very other factor —nationality, likelihood of compliance, the significance of the effects on American commerce, their foreseeability and their purposefulness—points to the appropriateness of exercising jurisdiction." *Ibid.*

DISCUSSION

This is a complex and important case. The parties include 19 States and several major domestic and foreign insurance companies. Petitioners state (H. Pet. 11) that the court of appeals' ruling "is of enormous importance and has disrupted the most basic operations of the insurance industry." Moreover, state officials have publicly recognized the significance both of the litigation generally and of the court of appeals' decision specifically.[2] The court's interlocutory decision does not, however, conflict with any decision of this Court or any other court of appeals. Although we are troubled by the court's

[2] See H. Pet. 10-11 (quoting state officials' comments). See also N.Y. State Bar Ass'n, Antitrust Law Sec. Symposium 109 (Jan. 28, 1992) (remarks of George Sampson, Chief of Antitrust Enforcement, State of New York) ("[I]t is incumbent upon the industry to examine many of the activities that currently go on in the industry and take a very careful look.").

suggestion that a domestic insurance company loses its antitrust immunity under the McCarran-Ferguson Act merely because it acts in concert with foreign reinsurers, that suggestion was part of an alternative holding that did not alter the result. Accordingly, we do not believe that review by this Court is warranted at this time.[3]

1. The McCarran-Ferguson Act exempts petitioners' activities from the federal antitrust laws to the extent that they are part of "the business of insurance," are "regulated by State Law," and are not "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. 1012(b), 1013(b). The petitioners in No. 91-1111 (the Hartford petitioners) contend (H. Pet. 14-18) that the court of appeals erred in holding that they are not entitled to antitrust immunity under the McCarran-Ferguson Act because they allegedly conspired with foreign reinsurers that are not generally subject to regulation by the States.[4]

We disagree with the court of appeals' suggestion that domestic insurers whose activities would otherwise be immune under the McCarran-Ferguson Act automatically forfeit that immunity merely because they participate in those activities with foreign reinsurers that are generally not subject to state regulation.[5] As the Hartford peti-

[3] Although we believe that the court of appeals reached the correct result, we intend no criticism of the district court's efforts to require the parties to focus their contentions and resolve as many legal and factual issues as possible without trial. Indeed, the government strongly endorses judicial management techniques of the sort that we understand were employed in this case to streamline antitrust litigation. Moreover, we do not view the court of appeals' decision as precluding the possibility that the case can be resolved on remand on motion for summary judgment.

[4] The petitioner in No. 91-1131, Winterthur Reinsurance Corp., raises each of the questions presented by the Hartford petitioners, and incorporates by reference the Hartford petitioners' arguments. W. Pet. 24.

[5] As the court of appeals observed (Pet. App. A22-A23), this Court has held that a State may not regulate reinsurers where no act in the course of formation, performance, or discharge of the reinsurance contract takes place within the State. See *Connecticut*

tioners correctly note (H. Pet. 15), McCarran-Ferguson immunity applies to "the business of insurance to the extent that such business is * * * regulated by State Law." 15 U.S.C. 1012(b). The statutory language focuses not on the nature of the "entity" at issue, but on the nature of the activity at issue—whether it is "the business of insurance"—and whether that activity is regulated by state law. Consequently, contrary to the court of appeals' conclusion, the mere fact that an "exempt entity" (*i.e.*, a domestic insurance company) acts in concert with a "nonexempt entit[y]" such as a foreign reinsurer does not automatically cause the exempt entity to "forfeit[] [its] antitrust exemption." Pet. App. A24.[6]

Despite our disagreement with the court of appeals' analysis in this respect, we do not believe that the court's ruling warrants interlocutory review. For reasons discussed below, we believe that the court of appeals correctly held that respondents have alleged conduct within the boycott exception to antitrust immunity under McCarran-Ferguson. The court's boycott ruling was "an 'independent ground' of decision" for denying McCarran-Ferguson immunity (H. Pet. 9); consequently, reversing the "forfeiture" ruling would not alter the court of appeals' decision. See *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297-298 (1956) ("This Court * * * reviews judgments, not statements in opinions."); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S.

General Life Ins. Co. v. *Johnson*, 303 U.S. 77, 81 (1938). The legislative history of McCarran-Ferguson indicates that Congress understood and accepted that limitation on state regulatory authority. See 91 Cong. Rec. 1442 (1945) (statement of Sen. McCarran).

[6] It is true, as petitioners recognize (H. Pet. 16), that one of the factors that is relevant to determining whether a particular practice is part of the "business of insurance" is whether the practice is "limited to entities within the insurance industry." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982). But respondents do not dispute that reinsurers are entities within the insurance industry, and we agree that reinsurance is "a very essential phase" of the business of insurance. 90 Cong. Rec. 6528 (1944) (statement of Rep. Miller).

837, 842 (1984).[7] In addition, unless the particular activities at issue were "regulated by State Law," they would fail for that reason to qualify for McCarran-Ferguson immunity. 15 U.S.C. 1012(b).

We recognize that primary insurers in the United States traditionally have had close ties with foreign reinsurers. Accordingly, petitioners are concerned about the implications of the court of appeals' reasoning for their day-to-day business activities. This is a legitimate and justifiable concern, but we are not persuaded that the Ninth Circuit's brief and singularly unilluminating discussion of the forfeiture issue warrants interlocutory review. In our view, primary insurers may indeed engage in joint activities with foreign reinsurers without forfeiting McCarran-Ferguson immunity to the extent that (1) the primary insurers are engaged in the business of insurance, and (2) their activities are regulated by the States. The second requirement depends, of course, on the law of each individual State. As to the first requirement, we fully agree with petitioners (and respondents do not appear to disagree) that reinsurance is part of the business of insurance, and that consequently discussions and agreements between primary insurers and reinsurers concerning the terms and conditions of insurance or reinsurance will generally fall within "the business of insurance."

2. a. The Hartford petitioners also contend (H. Pet. 18-25) that the court of appeals erred in ruling that their alleged activities constituted a boycott within the meaning of the McCarran-Ferguson Act. We are unpersuaded.

[7] The court of appeals concluded (Pet. App. A28-A29) that respondents have not alleged a boycott directed at excess and umbrella insurance. In our view, respondents' complaint may fairly be read as alleging that petitioners' alleged activities in the excess and umbrella market were in aid of the CGL boycott. In any event, the petitioners who deal in excess and umbrella insurance also deal in CGL insurance. Consequently, interlocutory review of the "forfeiture" issue would result, at most, in dismissal of some relatively minor claims against some petitioners.

Notwithstanding petitioners' assertion (H. Pet. 24), the court of appeals did not find "a boycott based on nothing more than collective agreements among insurers and reinsurers as to the coverage risks they would be willing to accept." To the contrary, the court of appeals expressly recognized that McCarran-Ferguson allowed the defendants to "confer and agree on the terms on which insurance would be offered; the immunity in so doing is incontestable." Pet. App. A25. The court concluded, however, that petitioners "are charged with much more." *Ibid.* In particular, the court explained, respondents allege that the primary insurers "enlisted the reinsurers to compel capitulation by ISO and the insurers who had refused to go along with the Hartford demands. * * * [T]he defendants have gone beyond joint action to their own regulation of the terms on which CGL and property insurance will be offered." *Id.* at A26-A27.[8]

In our view, the conduct alleged in the complaint falls within the exception to McCarran-Ferguson immunity for "any * * * act of boycott, coercion, or intimidation."[9] 15 U.S.C. 1013(b). Petitioners correctly note (H. Pet. 18) that this Court has decided only one case concerning the scope of the so-called boycott exception to McCarran-Ferguson. In *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 (1978), the four medical malpractice insurers in Rhode Island agreed that the three competitors of St. Paul would not sell insurance to St. Paul's customers. The *Barry* boycott was thus unusual because it was aimed directly at consumers rather than at competitors. The Court nevertheless concluded in *Barry* that the boycott provision was also intended to reach efforts by insurance companies to coerce unwilling competitors to adopt particular rules or practices. See 438 U.S. at 541, 549 ("boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target," and includes "regulation by private combinations [or] groups"). The dissenters in *Barry* agreed with the Court on this point. See *id.* at 565 (Stewart, J., dissenting) (boycott exception applies to "attempts by members of the insurance business to force other members to follow the industry's private rules and practices").

The *Barry* Court recognized that a clear example of a boycott was the activity at issue in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). See *Barry*, 438 U.S. at 546-550. *South-Eastern Underwriters* involved, among other things, conduct similar to that alleged here: a group of primary insurers conspired with reinsurers to deny reinsurance to competing primary insurers until they agreed to the conspirators' terms. See 322 U.S. at 535 ("The conspirators * * * employed boycotts together with other types of coercion and intimidation to force non-member insurance companies into the conspiracies * * *. *Companies not members of S.E.U.A. were cut off from the opportunity to reinsure their risks.*") (emphasis added).

The legislative history of the McCarran-Ferguson Act reinforces the conclusion that the activities alleged here fall within the boycott exception. Senator O'Mahoney, one of the Senate conferees and a floor manager of the legislation (91 Cong. Rec. 1208 (1945)), put the matter succinctly: "[A]ny attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in

[8] Petitioners contend (H. Pet. 24) that the court of appeals misread the complaints, and that "in each instance" respondents' allegations "amount[] to no more than an agreement as to the insurability of risks and the terms and conditions of insurance coverage." Fairly read, however, respondents' complaints adequately allege that petitioners enlisted reinsurers to compel dissenting primary insurers to go along with petitioners' demands—that is, they engaged in private regulation of the terms on which CGL insurance would be offered. In any event, interlocutory review of that fact-bound determination is not warranted.

[9] The word "boycott" derives from the treatment accorded to Charles C. Boycott, an English land agent in Ireland who was ostracized in 1880 for refusing to reduce rents. See *Webster's Third New International Dictionary* 264 (1986).

a way that was disapproved by them would be absolutely prohibited by this provision." *Id.* at 1480. See also *id.* at 1483 (statement of Sen. O'Mahoney) (Sherman Act will continue to prevent private groups from "regulat[ing] in the field of interstate commerce").

b. We disagree with the Hartford petitioners' suggestion (H. Pet. 21-24) that the boycott exception applies only to an "absolute refusal to deal upon any terms." H. Pet. 21. It is true that in *Barry* the Court noted that four medical malpractice insurers were "alleged to have agreed that three of the four would not deal on any terms with the policyholders of the fourth." 438 U.S. at 552. But the Court made that comment in the course of its analysis of the unusual boycott at issue in *Barry*, which was directed at consumers rather than competitors. Indeed, the Court began its discussion by holding that "the term 'boycott' is not limited to concerted activity against insurance companies," and then proceeded to consider whether "the type of private conduct alleged to have taken place in this case, *directed against policyholders*, constitutes a 'boycott.'" *Ibid.* (emphasis added). In addition, the *Barry* Court concluded that Congress intended the term "boycott" in McCarran-Ferguson to be interpreted in light of the definition of that term under the Sherman Act. 438 U.S. at 541. A boycott under the Sherman Act may include a conditional concerted refusal to deal. See *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209, 213 (1959) (some boycotting manufacturers and distributors continued to deal with the target, although not on the same terms as with the target's competitor, who was a part of the conspiracy).

Moreover, McCarran-Ferguson refers not only to boycotts, but also to "any * * * act of * * * coercion or intimidation." The ordinary meaning of "coercion" and "intimidation" is broad enough to encompass efforts to compel the target of the boycott to deal on specified terms. Indeed, those terms connote the use of power to compel the victim to do something—*i.e.*, a conditional refusal to deal. By contrast, if the boycott exception were limited

to absolute refusals to deal, the McCarran-Ferguson Act would immunize virtually any form of coercive activity, as long as the companies engaging in coercive tactics did not seek to drive their competitors completely out of business by refusing to deal with them on any terms. We therefore agree with the court of appeals that petitioners' alleged conduct is within the boycott exception of McCarran-Ferguson.[10]

Petitioners emphasize (H. Pet. 18 n.18) "the uncertain state of the boycott exception." See also *id.* at 22 (asserting that courts and commentators are badly confused over whether boycotts are limited to absolute refusals to deal). We agree that *Barry* did not resolve all questions in this area, and that it is by no means always self-evident whether a particular set of facts constitutes a "boycott." See *Barry*, 438 U.S. at 543 ("boycotts are not a unitary phenomenon") (quoting P. Areeda, *Antitrust Analysis* 381 (2d ed. 1974)). But, while uncertainties remain in this area of law, *Barry* did establish some basic lines of demarcation. As the court of appeals recognized (Pet. App. A25), an agreement among insurers "on the terms on which insurance would be offered," without more, is not a McCarran-Ferguson boycott. Moreover, such an agreement does not become a non-immune boycott merely because it has some effect on other insurers. But an otherwise lawful agreement becomes a non-immune boycott if it has the purpose and effect of "pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target," and amounts to "regulation by private combinations [or] groups." *Barry*, 438 U.S. at 541, 549. As leading commentators have recognized, "'a [concerted] refusal to

[10] The legislative history provides further evidence that Congress intended to outlaw efforts of private groups to impose their preferences on their competitors, without limitation as to the particular form such private regulation takes. See, *e.g.*, 91 Cong. Rec. 1480, 1483, 1485 (1945). Indeed, the conduct at issue in *South-Eastern Underwriters*, which petitioners themselves regard as the paradigm of a boycott outlawed by McCarran-Ferguson (H. Pet. 22), involved a conditional refusal to deal. 322 U.S. at 535, 562.

deal except [on specified terms], without more' is exempt," but such a refusal becomes "a nonexempt boycott as soon as the cartel members attempt[] to coerce recalcitrant members." P. Areeda & H. Hovenkamp, *Antitrust Law* 123 (Supp. 1991) (quoting *In re Workers' Comp. Ins. Antitrust Litig.*, 867 F.2d 1552, 1561 (8th Cir. 1989)).[11]

c. Petitioners' alleged conduct may pass muster under the antitrust laws even if it is not immune under

[11] Although petitioners assert that there is "pervasive disarray" in the lower courts over whether the boycott exception includes conditional refusals to deal, petitioners cite only two court of appeals decisions. Upon careful analysis, those decisions are not, we believe, in conflict. In *Virginia Academy of Clinical Psychologists* v. *Blue Shield*, 624 F.2d 476, 484 (4th Cir. 1980), cert. denied, 450 U.S. 916 (1981), the court stated that an allegation of boycott "does [not] necessarily fail because the concerted refusal to deal is conditional, rather than absolute." In *In re Workers Comp. Ins. Antitrust Litig.*, 867 F.2d 1552 (8th Cir. 1989), the court held that an agreement to expel recalcitrant insurers from a rating bureau was a McCarran-Ferguson boycott. There was no "absolute refusal to deal" in the *Workers Compensation* case because insurers were permitted to retain their membership in the rating bureau as long as they adhered to fixed rates and other conditions set by the conspiring insurers. The ABA report quoted by the petitioners (H. Pet. 22) cites not one case to support its assertion that "[m]ost cases require a refusal to deal on any terms." American Bar Ass'n, *Report of the Commission to Improve the Liability Insurance System* 54 n.10 (1989).

The confusion that petitioners discern arises because "[l]ogically speaking, a simple agreement among insurance companies to charge certain premium rates could be viewed as a boycott agreement, since its observance would result in a collective refusal to deal with policyholders except at a fixed price." *Proctor* v. *State Farm Mut. Auto. Ins. Co.*, 561 F.2d 262, 274 (D.C. Cir. 1977), vacated, 440 U.S. 942 (1979). For example, the quoted statement in the ABA report occurs in a footnote to the statement that "cooperative efforts to standardize policy forms have been thought to be included well within the McCarran-Ferguson exemption." *ABA Report* at 54. Although petitioners are correct that the boycott exception does not include every agreement that could be viewed as a conditional refusal to deal, it does not follow that *no* conditional refusal to deal is a McCarran-Ferguson boycott. See *Proctor*, 561 F.2d at 276 n.23 (rejecting suggestion "that a total refusal to deal is necessary").

McCarran-Ferguson. "It is axiomatic that conduct which is not exempt from the antitrust laws may nevertheless be perfectly legal." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 n.5 (1979). In particular, the Court has noted that "boycotts are not a unitary phenomenon," *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. at 543, and has carefully distinguished the breadth of the boycott exception to McCarran-Ferguson from the question "whether the conduct in question * * * is *per se* unreasonable." *Id.* at 542. The Court has firmly insisted that the latter category of group boycotts "is not to be expanded indiscriminately" and has generally limited application of the per se rule to "cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." See *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986). See also *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 293-295 (1985) (detailing characteristics relevant to determining whether a concerted refusal to deal merits per se treatment). "[W]here the economic impact of certain practices is not immediately obvious," the Court has applied the rule of reason rather than a per se analysis. *Indiana Fed'n of Dentists*, 476 U.S. at 458-459 (citing *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979)).

In this case, the complaints allege a concerted refusal to deal by reinsurers at the behest of a group of primary insurers. In our view, that is a claim within the exception to the McCarran-Ferguson Act for "boycott, coercion, or intimidation." There is thus no antitrust exemption for the alleged conduct, and the question whether petitioners' alleged conduct was lawful therefore must be analyzed under the antitrust laws. Although we express no view on the merits and have no firm basis for doing

so,[12] we note that further development of the facts may reveal that petitioners' alleged activities are subject to analysis under the rule of reason rather than the per se rule. For example, the decisions of this Court do not necessarily require per se condemnation if the challenged agreement called for the reinsurers to deal with all primary insurers on equal terms. The defendants would have an opportunity to make "plausible arguments that [the challenged practices] * * * were intended to enhance overall efficiency and make markets more competitive." *Northwest Stationers*, 472 U.S. at 294. In that case, per se condemnation would be warranted only if it can be shown that the restriction's "likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote." *Ibid.*

3. The Hartford petitioners contend (H. Pet. 26-30) that their alleged activities are exempt from the federal antitrust laws under the state action doctrine, because several States approved the revised ISO standard forms. That contention does not merit review.

The court of appeals applied the correct legal standard: in order for private anticompetitive conduct to be exempt from the antitrust laws under the state action doctrine, the activity must take place pursuant to clearly articulated state policy, and must be actively supervised by the State. Pet. App. A29. See *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). In addition, the court of appeals did not disagree with petitioners' contention that the States authorized and actively supervised the collective develop-

[12] In 1987, the Antitrust Division concluded that the primary cause of the crisis in property-casualty insurance was "unanticipated changes in the manner in which tort liability has been established and damages assessed." Antitrust Div., Dep't of Justice, *The Crisis in Property-Casualty Insurance*, *in* Tort Policy Working Group, *An Update on the Liability Crisis* App. 1 (1987). We are not aware of any reason to alter that conclusion. At the same time, our general assessment of the central cause of the insurance crisis does not, of course, rule out the possibility of specific instances of collusion.

ment of insurance forms, and that consequently that activity is shielded by the state action doctrine. Pet. App. A29.

The court of appeals concluded, however, that the activity challenged by respondents was separate conduct not authorized or supervised by the States; namely, a reinsurance boycott to coerce dissenting primary insurers to accept more restrictive terms and conditions of insurance. Pet. App. A29. The court held that dismissal on state action grounds was not appropriate, because "state approval of one activity is not state approval of a related but distinct activity. * * * The alleged anticompetitive conduct in the present case * * * was neither a reasonable nor necessary consequence of the conduct regulated and approved by the state." *Id.* at A29-A30.

Petitioners do not challenge the principle that "state approval of one activity is not state approval of a related but distinct activity." Pet. App. A29. Instead, petitioners disagree with the court of appeals' determination that "there are truly two distinct activities at issue." H. Pet. 28. That fact-bound dispute does not warrant interlocutory review by this Court. In any event, the court of appeals' ruling on the state action issue appears to be correct. While state officials may have been aware that reinsurers favored the revised ISO forms (H. Pet. 29 n.22), petitioners do not assert that the state insurance officials knew about—let alone approved or actively supervised—the alleged reinsurance boycott that coerced dissenting primary insurers and the ISO to alter the forms. See *FTC* v. *Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2178-2179 (1992). Indeed, it is highly unlikely that state officials approved or supervised such activity, because the state insurance laws expressly prohibit coercion and boycotts. See H. Pet. 27 n.21.[13]

[13] Petitioners correctly note (H. Pet. 27) that the state action doctrine does not require a State specifically to authorize every action that private parties might take to effectuate a state policy. See *Southern Motor Carriers Rate Conf.* v. *United States*, 471 U.S. 48, 65-65 (1985). But that principle does not imply that state approval of revised insurance forms necessarily constitutes au-

There is no merit to petitioners' assertion (H. Pet. 26) that principles of federalism require the dismissal of respondents' action. Although state regulators may "have the tools they need to deal with any alleged misconduct" (H. Pet. 27 n.21), Congress has carved out an express exception to the McCarran-Ferguson immunity for boycotts. Consequently, the attorneys general of 19 States did not misconstrue principles of federalism by bringing these consolidated antitrust actions. Cf. *Ticor Title Ins. Co.*, 112 S. Ct. at 2178.[14]

4. a. Both the court of appeals and the district court held that respondents have antitrust standing to pursue their claims against all the petitioners. Pet. App. A19-A21, A65-A69. In No. 91-1131, petitioner Winterthur Reinsurance Corp. contends that respondents lack antitrust standing to pursue claims against reinsurers.[15]

Winterthur contends (W. Pet. 11-17) that the Court should grant review to determine whether a plaintiff must satisfy all the factors discussed in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), in order to have antitrust standing, and if not, what weight is to be given to each separate factor in the standing analysis. But this case presents no opportunity to consider those general questions, because the court of appeals appears to have concluded that each of the *Associated General Contractors* factors favored standing. See W. Pet. App. 15a-17a.[16]

Winterthur objects (W. Pet. 18-24) to the court of appeals' application of the *Associated General Contractors* factors to the facts of this case. In particular, Winterthur contends that respondents' injuries were not sufficiently direct to confer antitrust standing because Winterthur is a reinsurer that deals only with other insurance companies, while respondents are consumers who deal only with primary insurers. W. Pet. 19-20. But Winterthur is alleged to have conspired with primary insurers to restrict the availability of *primary* insurance to respondents. See Pet. App. A134-A135, A137-A139; California Compl. Counts 1, 3, 4. Respondents are thus consumers in the very market that the alleged boycott was intended to disrupt; they suffered directly from a reduced range of services in the market in which the alleged restraint occurred. That injury was sufficiently direct to confer antitrust standing. See generally P.

thorization and active supervision of a boycott that is illegal under state law.

[14] There is no reason to vacate the judgment of the court of appeals and remand for further consideration in light of *Ticor*. The question in *Ticor* was whether the "active supervision" component of the state action doctrine requires that state officials actually determine whether the particular private anticompetitive activity at issue meets the State's regulatory criteria. In this case, the court of appeals did not question petitioners' contention that the States supervised and approved the standardized forms, but instead held that "state approval of one activity is not state approval of a related but distinct activity"—*i.e.*, the conspiracy to coerce reluctant competitors to accede to petitioners' proposed terms. H. Pet. App. 26a.

[15] As an initial matter, it is not clear that Winterthur preserved this argument before the court of appeals. Winterthur states (W. Pet. 2) that it is "a domestic reinsurance company." In addressing standing, the court of appeals noted (W. Pet. App. A19) that only the "foreign reinsurer defendants press[ed] their position on this appeal." Although Winterthur contends (W. Pet. 5 n.4) that it preserved the issue in a footnote in petitioners' brief in the court of appeals, the issue was not discussed in the text of the brief or included in the list of questions presented to the court of appeals.

[16] The court stated (W. Pet. App. 16a) that "almost all of the *Associated General Contractors* factors point to the presence of standing." Although that statement, standing alone, suggests that the court found at least one factor that weighed against standing, a reading of the court's entire opinion suggests that the court was referring to its findings (W. Pet. App. 15a-16a) that "[i]n the claims in which the reinsurers alone are defendants, there will be a problem of allocating the damages caused by the reinsurers as distinct from the damages caused by the primary insurers," and "a danger of duplicative recovery." The court went on to conclude, however, that "the net balance as to damages is in favor of standing." *Id.* at 16a. And the court concluded that each of the other *Associated General Contractors* factors favors standing. W. Pet. App. 15a-17a.

Areeda & H. Hovenkamp, *Antitrust Law* 365-366, 392 (Supp. 1991).[17]

Respondents' position is similar to that of Carol McCready in *Blue Shield* v. *McCready*, 457 U.S. 465 (1982). In *McCready*, an insurer allegedly conspired with psychiatrists to deny insurance reimbursement to subscribers who received psychotherapy from psychologists. The direct targets of the boycott were the psychiatrists' competitors, the psychologists. But the Court held that consumers of insurance such as McCready had standing to sue under the antitrust laws. Just as the boycott in *McCready* made the services of psychologists (and health insurance to pay for those services) unavailable to consumers, so the alleged reinsurance boycott in this case made desired forms of insurance unavailable to consumers such as the plaintiffs. See 457 U.S. at 478-480.

Winterthur observes (W. Pet. 20-21) that if the reinsurers had engaged in a price-fixing conspiracy, the indirect purchaser rule of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), would bar respondents' claims, and argues that the Court should extend the indirect purchaser rule to the victims of boycotts. *Illinois Brick*, however, concerned alleged horizontal price-fixing one step removed in the distribution chain from the consumer plaintiffs. In contrast, the antitrust violation alleged in this case is a two-level conspiracy to affect the terms on which primary insurers will sell insurance to consumers. For antitrust standing purposes, it is therefore more closely analogous to resale price maintenance than to horizontal

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[17] Winterthur argues (W. Pet. 20-21) that respondents have not alleged an antitrust injury. No other petitioner raises that argument, and it merits no further review. Respondents allege that Winterthur conspired with primary insurers to engage in a reinsurance boycott that had the purpose and effect of limiting the types of primary insurance that are available to respondents. Respondents have thus alleged an adverse effect on competition of the kind that the antitrust laws are intended to prevent. Winterthur also faults the court of appeals for considering defendants' intent to harm the plaintiffs. See W. Pet. 18-19. But the Court has recognized that intent is relevant to the standing inquiry. See *Associated General Contractors*, 459 U.S. at 537 & n.35.

price-fixing. As leading commentators have recognized, *Illinois Brick* has little application in such cases. "Although the [reinsurer] did not sell directly to the consumer, [it] is a fellow conspirator with the direct-selling [primary insurer] and therefore jointly and severally liable * * * for the consumer's injury." P. Areeda & H. Hovenkamp, *supra*, ¶ 337.2e, at 404.

Moreover, the Court concluded in *McCready* that the problems of duplicative recovery and apportionment of damages at issue in *Illinois Brick* did not arise in the context of the *McCready* boycott. 457 U.S. at 474-475. This case, like *McCready*, does not appear to present a "risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws." *Ibid.* Respondents' alleged injury consists of incurring costs not covered by insurance, or paying excessive amounts to obtain insurance coverage. Although the coerced primary insurers might also bring an antitrust suit, they presumably would allege a different type of injury, namely decreased sales of primary insurance as a result of the reinsurance boycott.

b. In No. 91-1146, a group of London reinsurers (the Unionamerica petitioners) contends that respondents lack antitrust standing to pursue certain claims directed solely against foreign reinsurers and unnamed co-conspirators. The Unionamerica petitioners argue (U. Pet. 10-15) that the court of appeals erred by treating antitrust injury as an element of the antitrust standing inquiry. As a result, petitioners contend (U. Pet. 10), "the Ninth Circuit has created a balancing test that permits a plaintiff showing antitrust injury to sue without establishing directness—and, conversely, a directly injured plaintiff to sue without establishing antitrust injury." But petitioners do not contend that respondents have failed to allege an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). See U. Pet. 14 (petitioners' standing "motion did not raise the *Brunswick* antitrust injury

issue"). Moreover, the court of appeals expressly found that "[t]he injury alleged was direct." Pet. App. A20. Consequently, the court of appeals would not have reached a different result if it had considered antitrust injury separately from antitrust standing.[18]

The Unionamerica petitioners also contend (U. Pet. 15-21) that the disputed counts of the complaints do not allege a sufficiently direct antitrust injury to confer antitrust standing. According to petitioners, the disputed counts allege only an agreement among foreign reinsurers, and respondents did not buy anything from the foreign reinsurers. In fact, the disputed counts of the complaints allege an agreement not only among foreign reinsurers, but also including "unnamed co-conspirators." Pet. App. A141-A147. In addition, the complaints allege an intent to affect the availability of primary insurance to respondents. *Ibid.* Consequently, the Unionamerica petitioners are not in a materially better position than Winterthur to dispute plaintiffs' standing. Nor, in light of *McCready*, is there merit to their version of the argument that the indirect purchaser rule of *Illinois Brick* should be applied mechanically to customers in markets that are the focus of a boycott.

5. The petitioners in No. 91-1128 (the Merrett petitioners) trade in reinsurance on the Lloyds of London market. They contend that principles of comity require the dismissal of some of the counts against them. They do not contend that comity shields them from respondents' allegations that they conspired with primary insurers in the United States to deny reinsurance to other primary insurers who refused to alter the terms of CGL insurance. Pet. App. A135-A140, A186-A190, A195-A196. Instead, the Merrett petitioners contend that comity requires

[18] Excluding antitrust injury from the antitrust standing inquiry plainly would not have altered the court's views as to the directness of alleged injury. Moreover, although the court accorded "tremendous significance" to the nature of the alleged injury, it also found that other *Associated General Contractors* factors also "point to the presence of standing against all of the defendants." Pet. App. A20, A21. See note 10, *supra*.

the dismissal of three counts in which they are alleged to have conspired with unnamed co-conspirators to deny reinsurance to primary insurers in the United States until those insurers adopted the proposed changes to their primary insurance policies. See California Compl. Counts 5, 6, and 8. Pet. App. A141-A147.

Both the court of appeals and the district court analyzed the comity issue under the balancing test of *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976). The district court concluded that dismissal of the disputed counts was appropriate because "the conflict with English law and policy which would result from the extra-territorial application of the antitrust laws in this case is not outweighed by other factors." Pet. App. A81. The court of appeals reversed the district court because it concluded that "every other factor" except the conflict with British law and policy weighed in favor of jurisdiction. Pet. App. A32-A35.

Although petitioners contend (M. Pet. 12-18) that the courts of appeals have taken a variety of approaches in analyzing questions of comity, they do not contend that another court of appeals applying a different test would have reached a different result in this case. Indeed, petitioners do not object to the Ninth Circuit's *Timberlane* test, which they regard as "the most enlightened application of principles of international law to questions of jurisdiction under U.S. economic legislation." M. Pet. 3. Accordingly, this case does not present the question whether the *Timberlane* test, or some other test, states the appropriate standard for analyzing questions of comity.

Petitioners' principal complaint is that the Ninth Circuit has misapplied its own *Timberlane* test. Even if that were true, it would not ordinarily warrant review by this Court. But in any event, we think that the result the court of appeals reached under *Timberlane* is reasonable. The court recognized that application of the federal antitrust laws in this context is inconsistent with British law and policy, and that "[s]uch a conflict, unless outweighed by other factors, would by itself be reason to

decline exercise of jurisdiction." Pet. App. A32.[19] But the court concluded that the conflict was outweighed by other factors: the substantial and foreseeable adverse effects on the United States, where the defendants do at least half their casualty underwriting; the alleged intent of the defendants to harm commerce in the United States; the fact that several of the petitioners are wholly owned subsidiaries of United States corporations; the fact that, regardless of the ruling on comity, the foreign firms will remain as defendants as to other counts of the complaints; and the ability of a United States court to grant effective relief by awarding damages payable from the defendants' assets in the United States or by issuing an injunction directed only at U.S. defendants. Pet. App. A33-A35. There is no reason for this Court to review that fact-specific analysis by the court of appeals at this juncture.

Finally, petitioners object (M. Pet. 22-24) to the court of appeals' comments concerning the relationship between *Timberlane* and the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a.[20] The court of appeals stated:

[19] In its brief as *amicus curiae* submitted in support of the Merrett petitioners, the United Kingdom states (U.K. Br. 9) that "the conflict in this case arises because plaintiffs ask the U.S. courts to place restrictions on the British industry which is operating under the British regulatory and competition regime," and to hold British nationals liable for conduct that does not violate British law. But neither the United Kingdom nor the Merrett petitioners contend that British policy compelled or encouraged the alleged reinsurance boycott, or that petitioners could not have complied with both American and British law. Moreover, British courts have recognized that British subjects who violate American antitrust laws may be subject to the jurisdiction of American courts in certain circumstances. See *Midland Bank Plc.* v. *Laker Airways Ltd.*, [1986] 2 W.L.R. 707 (C.A.).

[20] The FTAIA provides in relevant part that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless * * * such conduct has a direct, substantial, and reasonably foreseeable effect * * * on trade or commerce which is not trade or commerce with foreign nations." 15 U.S.C. 6a.

> We do not believe a *Timberlane* analysis * * * can be unaffected by the statute. If a complaint survives the new bar of 15 U.S.C. § 6a because the conduct has a "direct, substantial, and reasonabl[y] foreseeable effect" on American commerce, it is only in an unusual case that comity will require abstention from the exercise of jurisdiction. But as the legislation does not eliminate comity, a court should look to see if the case before it is one in which comity still has a role to play.

M. Pet. App. A28. Petitioners do not claim that jurisdiction in this case is barred by the FTAIA. Nor do they assert that the court of appeals' comments concerning the FTAIA conflict with any decision of this Court or another court of appeals. In any event, the court's suggestion that the FTAIA may affect the *Timberlane* analysis was dicta, because the court concluded that the *Timberlane* analysis, quite apart from the FTAIA, required it to exercise jurisdiction. Pet. App. A32-A35.[21]

[21] The court of appeals referred (H. Pet. App. 32a) to "the weight of the *findings* already made under the [FTAIA]" (emphasis added). But that statement referred only to the district court's findings that "the alleged agreement * * * concerned the provision of reinsurance within the United States," and that "the allegations of effects in United States markets are sufficient to preclude a characterization of wholly foreign commerce." H. Pet. App. 27a.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 91-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, THREE QUAYS UNDERWRITING MANAGEMENT LIMITED, JANSON GREEN MANAGEMENT LIMITED, MURRAY LAWRENCE & PARTNERS, D.P. MANN UNDERWRITING AGENCY LIMITED, ROBIN A.G. JACKSON, PETER N. MILLER, EDWARDS & PAYNE (UNDERWRITING AGENCIES) LIMITED, and STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS PURSUANT TO RULE 15.7

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IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONERS PURSUANT TO RULE 15.7

Petitioners submit this supplemental memorandum in response to the *amicus curiae* brief filed by the Solicitor General on behalf of the United States (hereinafter, "*U.S. Br.*")

ARGUMENT

The government's treatment of the international law implications of this case is curt, dismissive of the objections tendered by the British Government, and yet in the end advances no substantive position of its own. By slighting the international law ramifications of the Ninth Circuit's unprecedented expansion

of antitrust jurisdiction, the government lets rule the "parochial concept that all disputes must be resolved under our laws and in our Courts" — a point of view this Court has repeatedly condemned. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972); *accord, Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

In many respects, the government's brief is more important for what it does not say than for what little it says. Nowhere does the government assert any interest of the United States in the prosecution of this action that could be measured against, let alone outweigh, that of the United Kingdom in leaving regulation of Lloyd's and the London reinsurance market to British law and institutions. The government does not dispute that in this case an unprecedented expansion of American jurisdiction would supplant the considered policies, interests and traditions of a friendly foreign sovereign. Like plaintiffs, the government does not controvert any of the reasons advanced by petitioners why the petition should be granted. Nor does the government dispute that "[t]his Court has never addressed the question whether and to what extent the extraterritorial reach of this nation's economic regulatory laws is restrained by considerations of international law and comity." *Petition* at 3.

At the same time, the government does not endorse the arguments advanced by plaintiffs why the writ should not be granted. The government makes no mention of plaintiffs' "global conspiracy" claim. *Compare Respondents' Consolidated Brief in Opposition to Petitions for Writs of Certiorari* ("*Respondents' Br.*") at 21-22. And the government does not take issue with the position of the British Government, which both courts below accepted, that implementing antitrust jurisdiction in this case raises a substantial conflict with British law and policy. *Compare Respondents Br.* at 24-25.

Although the government concedes the gravity of the international conflict this case presents, it is silent on the nature of that conflict. It does not attempt to come to grips with the fact that the three counts of the complaint which the district court

dismissed on grounds of international law and comity name only English defendants and charge exclusively foreign conduct in a market regulated by a foreign sovereign. The government all but ignores the unique institution of Lloyd's and the Lloyd's Acts (*see Petition* at 4-6) and the havoc this case will play with the British scheme of regulation which, as the British Government states, "has its origins in the history of the British insurance industry and of British competition policy, and the way in which the British Parliament has thought fit to legislate on both aspects over the years." *Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners* at 8.

The government does not say whether a standard rule of law should apply in the comity analysis, nor does it articulate a particular rule. The government does not say what weight it believes the conflict with foreign law or policy deserves in judging the reasonableness of jurisdiction in this case or in private litigation generally. The government does not even purport to apply a test, thus graphically demonstrating that this area of the law lacks clear guidance from this Court.

Furthermore, the government's discussion of the Ninth Circuit's purported balancing of factors endorses neither that court's reasoning nor its result. The government says that "the result the court of appeals reached under *Timberlane* is reasonable" (*U.S. Br.* at 23) but does not address the central point of the petition, which argues that the Ninth Circuit did not merely "misapply" *Timberlane* but instead imported wholly unrelated concepts from the Foreign Trade Antitrust Improvements Act, 15 U.S.C. §6a ("FTAIA") to relegate a conflict with foreign law and policy almost to irrelevance in the comity analysis. *See Petition* at 3, 8-9, 22-24. The government does not reject either *Timberlane* or the Ninth Circuit's sharply restricted balancing test. Instead, it strives to downplay the Ninth Circuit's misuse of the FTAIA, calling that part of the court's opinion "comments," "suggestion" and "dicta." *U.S. Br.* at 25. As shown in the petition, however, the Ninth Circuit's discussion of the FTAIA was not mere "suggestion." Rather, it was critical to the court's analysis of the role of international law in jurisdictional disputes, and it dictated the court's result.

In the end, the government merely reiterates the Ninth Circuit's "conclusions" and states that "[t]here is no reason for this Court to review that fact-specific analysis . . . at this juncture." *U.S. Br.* at 24. Yet neither plaintiffs, the court below, nor the government assert that disputed facts are at issue here or identify in what respect the issue would be better presented at a later juncture. Moreover, the application of international law in any case will be "fact-specific,"[1] but like any inquiry into whether a particular forum is proper in an international case, it must be undertaken before the litigation is complete if the concerns of other nations and the international legal system are to be respected. Contrary to the government's bare assertion, therefore, the best time to review the international law implications of the ruling of the court below is now, before a lengthy and disruptive trial has further undermined the orderly allocation of jurisdiction among nations. *Cf. Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953) (international law "aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own").

As this Court has observed before, "the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial review of the controversy over the [assertion of jurisdiction in this case]." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963). This is especially true where the actions of the plaintiff states and the decision of the court below have aroused "vigorous protest" from the foreign government concerned. *Id.*

It would be unfair to permit this case to go forward against these petitioners without review at this time. Contrary to the

[1] This Court's opinions in, for example, *Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987) and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987) were "fact-specific", but that did not deter the Court from setting forth guidelines for future case raising the questions addressed in those decisions.

government's assertions, *see U.S. Br.* at 24, none of these petitioners has *any* legal affiliation with United States corporations, none has assets in the United States, and many are not named in other counts of the complaints besides plaintiffs' contrived "global conspiracy" count. Because, as the court below stated, complete forward-looking relief can be obtained against the American defendants on the other counts of the complaints (A-30)[2], there is no reason to allow the counts directed solely against English defendants to continue. The only result of such a course would be a gratuitous slap at a friendly foreign sovereign and a needless insult to principles of international law and comity.

CONCLUSION

While other petitions for *certiorari* submitted in this litigation raised issues of pure antitrust law, this petition raises substantial questions of international law. In an attempt to characterize this case as only an antitrust action, the Solicitor General gave scant attention to the issues of international law and comity which persuaded Judge Schwarzer but were brushed aside by the court of appeals. This Court should grant this petition even if it believes that the concerns raised in the other petitions can be postponed until after trial.

[2] Refers to the Appendix to the *Petition for Certiorari* in No. 91-1128.

Respectfully submitted,

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Dated: August 27, 1992

Nos. 91-1111 and 91-1128

In the Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL., RESPONDENTS

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITIONS FOR WRITS OF CERTIORARI FILED JANUARY 10, 1992 (No. 91-1111) AND JANUARY 13, 1992 (No. 91-1128).
CERTIORARI GRANTED OCTOBER 5, 1992

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* The decisions of the district court and of the court of appeals are printed in the appendices to the petitions for writs of certiorari and have not been reproduced here.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 89-16405, 89-16513 to 89-16531

IN RE INSURANCE ANTITRUST LITIGATION

On Appeal from the United States District Court for the Northern District of California

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RELEVANT DOCKET ENTRIES

DATE	EVENT
1990	
May 10	Plaintiffs' brief filed.
May 10	State of New York's supplementary brief filed.
May 10	United States' brief *amicus curiae* filed.
May 11	13 States' brief *amicus curiae* filed.
August 6	Defendants' brief filed.
August 6	London reinsurance appendix to defendants' brief filed.
August 6	Government of the United Kingdom's brief *amicus curiae* filed.
October 4	Plaintiffs' reply brief filed.
October 4	State of New York's supplemental reply brief filed.

DATE	EVENT
1991	
March 15	Case argued and submitted.
June 18	Opinion filed.
July 2	Defendants' petition for rehearing and suggestion for rehearing en banc filed.
August 7	Plaintiffs' consolidated response to defendants' petition for rehearing and suggestion for rehearing en banc filed.
October 15	Petition for rehearing denied.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. MDL 767

IN RE INSURANCE ANTITRUST LITIGATION

RELEVANT DOCKET ENTRIES

DATE	NO.	DESCRIPTION
1988		
March 22		California complaint (docket entry 1 in C-88-0981 WWS).
May 2	1	Pretrial order no. 1.
June 14		Connecticut complaint (docket entry 1 in CV-88-2332).
June 14	18	First amended complaint (as to C-88-0985).
June 17	275	Related case order.
September 6	311	First amended complaint (as to C-88-2341).
September 8	341	Pretrial order no. 2.
December 9	488	Pretrial order no. 3.
December 16	508	Foreign defendants' memorandum in support of motion to dismiss on comity grounds.
December 16	509	Appendix to no. 508.
December 16	513	Domestic defendants' memorandum in support of dismissal or summary judgment on McCarran-Ferguson Act grounds.

DATE	NO.	DESCRIPTION
December 16	515	Affidavit of Carole Banfield.
December 16	519	Domestic defendants' memorandum in support of motion for summary judgment on state action grounds.
December 16	522	Domestic defendants' state-by-state appendix.
1989		
January 3	540	Pretrial order no. 4.
March 7	757	Pretrial order no. 5.
March 29	763	Stipulation re suspension of plaintiff states' discovery against defendants.
March 31	764	Pretrial order no. 6.
April 28	836	Plaintiff states' unified brief in opposition to defendants' 12/16/88 filings.
April 28	837	Appendices to plaintiff states' unified brief.
June 23	848, 849, & 451	Defendants' reply memoranda in support of motions to dismiss and for summary judgment.
September 15	866	Argument on court's proposed opinion and order.
October 5	876	Plaintiff states' Rule 59(e) memorandum.
October 10	880	Revised opinion and order.
October 10	881	Revised judgment.
October 20 & November 6		Notices of appeal filed.
December 5	844	Transcript of 9/15/89 hearing on proposed opinion and order.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C 88 0981 WWS

ANTITRUST; CLASS ACTION;
JURY DEMAND

THE STATE OF CALIFORNIA, on behalf of itself and all political subdivisions and special districts within the State similarly situated, CITY OF LAFAYETTE, CITY AND COUNTY OF SAN FRANCISCO, AND COUNTY OF SAN BENITO, PLAINTIFFS

v.

HARTFORD FIRE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, AETNA CASUALTY AND SURETY COMPANY, CIGNA CORPORATION, INSURANCE SERVICES OFFICE, INC., PETER N. MILLER, ROBIN A.G. JACKSON, MERRETT UNDERWRITING AGENCIES MGT., LTD., THREE QUAYS UNDERWRITING LTD., JANSON, GREEN, LTD., EDWARDS AND PAYNE MANAGEMENT (U.A.), LTD., C. J. WARRILOW-HINE & BUTCHER, LTD., J. BRIAN HOSE & OTHERS, LTD., HARVEY BOWRING, LTD.—MURRAY LAWRENCE & PARTNERS, K.F. ALDER & OTHERS, (U.A.) LTD., D.P. MANN & OTHERS (U.A.) LTD., UNIONAMERICA INSURANCE CO., LTD., CNA RE (U.K.) LTD., TERRA NOVA INSURANCE CO., LTD., EXCESS INSURANCE GROUP, LTD., KEMPER REINSURANCE LONDON LTD., CONTINENTAL REINSURANCE CO. (U.K.) LTD., THOMAS A. GREENE & CO., INC., BALLANTYNE, MCKEAN & SULLIVAN, LTD., R.K. CARVILL & CO., LTD. GENERAL REINSURANCE CORPORATION, CONSTITUTION REINSURANCE CORPORATION, MERCANTILE & GENERAL REINSURANCE COMPANY OF AMERICA, PRUDENTIAL REINSURANCE COMPANY, NORTH AMERICAN REINSURANCE CORPORATION, WINTERTHUR SWISS INSURANCE COMPANY, REINSURANCE ASSOCIATION OF AMERICA, DEFENDANTS

COMPLAINT

[Filed March 22, 1988]

PRELIMINARY STATEMENT

The State of California by its Attorney General John K. Van De Kamp, brings this action on its own behalf and on behalf of counties, municipalities and other local governmental units in California which purchase commercial general liability ("CGL") insurance and have been injured by defendants' violations of federal and state antitrust laws. Defendants include major insurance and reinsurance firms and their trade associations whose illegal collusion resulted in severe restrictions in the availability and affordability of insurance coverage for businesses and governmental entities.

The first four claims for relief concern the manipulation of the standard policy forms for coverage of commercial general liability risks. These forms, produced by defendant Insurance Services Office, Inc. ("ISO"), dominate the markets for the general liability insurance purchased by most insurance consumers. Anticonsumer revisions were made in the ISO CGL forms as the result of boycotts, threats, intimidation and other coercive conduct by defendants. Insurance coverage for pollution was completely excluded from the ISO CGL policy forms. Insurance coverage for prior events was also eliminated in the new ISO CGL "claims-made" insurance form. Moreover, the defendants' conspiratorial and coercive conduct caused a severe market-wide constriction of CGL insurance coverage, such that this coverage was unavailable to many businesses and governmental entities.

The fifth claim alleges that defendant reinsurance companies and others conspired to boycott the "occurrence form" of ISO's CGL policy to coerce insurers into offering the "claims made" form which affords consumers of insurance services far less actual insurance coverage. The sixth and eighth claims allege that domestic and foreign reinsurers boycotted, and withheld reinsurance from the coverage of pollution risks. The seventh claim concerns the conspiracy between ISO and other defendants to standardize both "Umbrella" and Excess insurance forms. The ninth, tenth and eleventh claims concern violations of California state statutes as a result of these same acts.

Plaintiffs seek declaratory and injunctive relief, civil penalties and threefold the damages sustained as a result of defendants' conspiracies in unreasonable restraint of trade.

I

JURISDICTION AND VENUE

1. This complaint is filed and the jurisdiction of the court is invoked under the provisions of 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. §§ 15 and 26 for monetary and declaratory and injunctive relief for injuries caused by defendants' violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Claims arising under California Business and Professions Code section 16700 et seq., commonly known as the Cartwright Act, California Insurance Code section 790, commonly known as the Unfair Insurance Trade Practices Act, and California Business and Professions code section 17200 et seq., commonly known as the Unfair Competition Act, are also stated herein, which this Court has jurisdiction over pursuant to principles of pendent jurisdiction.

3. Venue is proper in this District under Sections 4 and 12 of the Clayton Act (15 U.S.C. §§ 15 and 20) and 28 U.S.C. § 1391 because each of the defendants transacts business, has agents, resides or is found within the Northern District of California, and the claims alleged herein arose in the Northern District of California. Certain of the defendants are aliens as alleged below.

II

DEFINITIONS

4. As used in this complaint, the following terms are defined as:

a. "Commercial general liability" (CGL) insurance means insurance coverage for third party casualty damage claims against a purchaser of insurance (the "insured"). Purchasers of CGL insurance include governmental entities, not-for-profit corporations and businesses. CGL insurance does not include coverage for damage to the property of an insured.

b. "Occurrence form" means a liability insurance form that covers losses, whenever claimed, that occur during the policy period. The policy in force when the injury or loss occurs pays the claim, even if the claim is made after the policy has expired. Prior to 1984, occurrence coverage was the principal form used for CGL insurance.

c. "Claims-made form" means a CGL form under which the insured is liable only for those claims made during the policy period. It does not cover any claim that is received after the expiration date of the policy, even if the accident or event giving rise to the claim occurred during the effective dates of the policy. Prior to 1984, the claims-made form was not ordinarily used for CGL insurance.

d. "Dual form availability" means the availability of two standard CGL forms: an occurrence form and a claims-made form.

e. "Retroactive date" (Retro Date) means a provision in a claims-made insurance contract which excludes coverage for accidents or events that occurred prior to the specified retroactive date.

f. "Defense within limits" (also referred to as "defense cost containment", "defense cost within policy limits"; "defense cost cap") means a CGL policy provision which includes the insurers' defense costs as part of the stated policy limits. CGL insurance policies have historically included an obligation for the insurer to pay the full legal costs of defending a claim without regard to policy limits.

g. "Pollution exclusion" refers to the exclusion from the 1986 ISO CGL forms of all coverage for pollution claims, including claims alleging damage caused by "sudden and accidental" pollution. The 1986 ISO CGL forms eliminated all coverage for pollution exposures of plaintiffs herein.

h. "Tail" means the length of time during which an insurance company expects to receive claims arising from a certain risk covered by the insurance policy. Claims arising from "slips and falls" present the insurer with "short tail" exposure since all such claims will generally be known within a short time after their occurrence. Claims arising from environmental hazards such as asbestos pollution present insurers with "long tail" exposure because claims may be filed many years after the occurrence giving rise to such claim.

i. "Risk" means the hazard or type of potential accident for which insured seeks insurance protection. The term is also used within the industry to describe the insured itself, such as a "commercial risk" or a "municipal risk."

j. "Primary insurer" means an insurance company that sells insurance directly to consumers including businesses and governments.

k. "Insurance Services Office, Inc." or ISO is a not-for-profit corporation, with offices in San Fran-

cisco, California and New York, New York, which is a trade association for approximately 1,400 primary property/casualty insurance companies operating in the United States. One of ISO's functions is to develop standard policy forms and coverage parts for use by insurance companies.

l. "1973 ISO CGL form" means the standard CGL occurrence form and coverage parts developed by ISO in 1973, as amended prior to 1984.

m. "1984 ISO CGL forms" means the two CGL forms filed lodged or with state regulators in March 1984: an occurrence form and a claims-made form.

n. "1986 ISO CGL forms" means the two CGL forms filed by ISO with state regulators in 1986. These forms contained a complete pollution exclusion, and the claims-made form included a retroactive date.

o. "Reinsurance" means insurance for insurers. Reinsurance is a transaction whereby one insurance company, the reinsurer, agrees to indemnify another insurance company for a designated part of the insurance risks underwritten by the primary company.

p. "Treaty" means a contract by which a primary insurance company transfers to a reinsurer a portion of a category of risks which it will obligate itself to cover during the term of the treaty.

q. "Layer" or "layer of coverage" means a portion of risk taken on by either a primary insurer or reinsurer. Risks are layered in the sense that an insurer or reinsurer may have to respond only to claims above a certain amount but below another amount. For example, a reinsurer may have a contract or treaty to cover risk indemnification in excess of $1 million but less than $2 million. The primary insurer may retain the first million dollars in exposure, while other reinsurers may take on higher

risk exposure layers, in this example layers above the $2 million level.

r. "Underwriting" means the act of assessing a risk and calculating a premium to be charged by a company or syndicate.

s. A "syndicate" is a group of individual investors associated with Lloyd's of London. Syndicates can act as both insurers and reinsurers. Each syndicate utilizes the services of an active underwriter to make its underwriting decisions and conduct all other insurance related business.

t. "Lloyd's of London" is a marketplace composed of syndicates and is located in London, England. Lloyd's provides North American consumers with both reinsurance and insurance. Approximately half of Lloyd's casualty business involves North American risks.

u. A "lead underwriter" negotiates the terms of a reinsurance treaty which his syndicate or company will cover. A broker will then arrange for other syndicates or companies to join the treaty on the same conditions as that negotiated by the lead underwriter.

y. "London Company Market" means a group of insurance firms located in London outside of Lloyd's. These firms provide coverages for insurance and reinsurance, often by following the lead of a Lloyd's syndicate on the treaty in question.

w. "Sunset clause" means a provision included in a reinsurance treaty which limits the reinsurer's liability to those claims that are tendered by the reinsured primary company prior to a designated "sunset date." Thus a five year sunset clause means than the primary insurer will have no reinsurance coverage for claims presented later that five years after the inception of the treaty.

III

PLAINTIFF

5. The State of California, by its Attorney General, John K. Van de Kamp, brings this actions on its own behalf, on behalf of the class hereinafter described, and as *parens patriae* on behalf of the general welfare and economy of the State of California. City of Lafayette, City and County San Francisco, and City of San Benito are representative of public entities who compose the plaintiff class. The violations of federal and state law alleged herein have caused loss and damage and threaten continued loss and damage to the general welfare and economy of the State of California, as well as to individual members of the plaintiff class.

IV

CLASS ACTION ALLEGATIONS

6. Plaintiffs bring this action for declaratory and injunctive relief as well as for damages, pursuant to Rules 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure, on behalf of itself and all members of a class comprised of all governmental entities within the State of California except entities and institutions of the United States government, that have purchased or sought to purchase CGL insurance from the defendants or their co-conspirators during the period of the conspiracy alleged herein. It also includes public entities which, unable to purchase CGL insurance due to the actions of the defendants or their co-conspirators herein, sought and obtained other form(s) of indemnity protection from whatever source, including self insurance.

7. Plaintiffs State of California, City of Lafayette, City and County of San Francisco, and County of San Benito are members of the class; their claims are typical of the claims of all class members; and they will fairly and adequately protect the interests of the class.

8. The class is so numerous that joinder of all members is impracticable. It consists of thousands of governmental entities in California as described above.

9. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Questions of law and fact common to the members of the class predominate over any questions affecting individual members. The common questions of fact and law include the existence of the combination and conspiracies herein alleged, the extent to which members of the class were injured by the violation alleged, and the liability of defendants for the injury suffered by members of the class.

10. The claims of plaintiffs and other class members are identical, and the defenses will be identical with respect to each class member.

11. A class action is superior to any alternative method for the fair and efficient adjudication of this controversy.

V

DEFENDANTS

12. Defendants Merrett Underwriting Agencies, (hereinafter "(U.A.)" Management, Ltd., Three Quays Underwriting Management Ltd., Janson, Green, Ltd., Edwards and Payne (U.A.), Ltd., C.J. Warrilow-Hine & Butcher Ltd., J. Brian Hose and Others, Ltd., Harvey Bowring, Ltd.-Murray Lawrence & Partners, K.F. Adler and Others (U.A.) Ltd., and D.P. Mann and Others (U.A.) Ltd., are underwriters for syndicates doing business through Lloyd's of London. These defendants contract for their syndicates to provide reinsurance and insurance on property and casualty risks throughout the United States, specifically including the Northern District of California.

13. Defendant Thomas A. Greene & Co., Inc. is a reinsurance broker with offices located in San Francisco and New York, which company provides brokerage services for the provision of reinsurance to insurance companies on risks throughout the United States, specifically including the Northern District of California.

14. Defendants Ballantyne, McKean and Sullivan, Ltd. and R.K. Carvill & Co., Ltd., are reinsurance brokers with offices in London, England, who arrange reinsurance coverages for U.S. insurance companies at Lloyd's and in the London Company market. These coverages concern risks located throughout the United States, specifically including the Northern District of California.

15. Defendant Robin A.G. Jackson was, at all times relevant herein, chief underwriter for Merrett (U.A.) Mgt., Ltd.'s Non-Marine Syndicates. Jackson is a citizen of the United Kingdom and resident of London, England. As Chief Underwriter for Merrett, Jackson provided reinsurance and insurance for casualty and property risks throughout the United States, specifically including the Northern District of California.

16. Defendant Peter North Miller was, at all times relevant herein, the Chairman of the Council of Lloyd's of London, the governing body of Lloyd's. Miller is a citizen of the United Kingdom and a resident of London, England. Miller conducted relevant business of Lloyd's of London and of the Council of Lloyd's throughout the United States, particularly including personal conduct of such business in the Northern District of California.

17. Defendants Terra Nova Insurance Co., Ltd., Unionamerica Insurance Co., Ltd., CNA Re (U.K.) Ltd., Excess Insurance Group, Ltd., Kemper Reinsurance London Ltd. and Continental Reinsurance Co., (U.K.) Ltd. are underwriting companies within the London Company Market, which provide reinsurance for property and casualty risks

throughout the United States, specifically including the Northern District of California.

18. Defendants General Reinsurance Corporation, Constitution Reinsurance Corporation, Prudential Reinsurance Company Mercantile, and General Reinsurance Corporation of America, and Northern American Reinsurance Corporation are United States corporations which provide reinsurance for risks throughout the United States, specifically including the Northern District of California.

19. Defendant Winterthur Swiss Insurance Company of Winterthur, Switzerland, provides reinsurance for risks throughout the United States, specifically including the Northern District of California.

20. Defendants Allstate Insurance Company, the Hartford Fire Insurance Company, Aetna Casualty and Surety Company, and CIGNA Corporation are United States corporations which provide insurance for risks throughout the United States, specifically including the Northern District of California.

21. Defendant Reinsurance Association of America (RAA) is a trade association of domestic reinsurers providing reinsurance on risks throughout the United States, specifically including the Northern District of Californa. The RAA's principal business consists of lobbying activity, and the RAA conducts such activity in the Northern District of California.

22. Defendant Insurance Services Office, Inc. (ISO) is a not-for-profit corporation with offices in San Francisco, California and New York, New York which develops rates and forms which are used by insurance companies in the sale of insurance throughout the United States specifically including the Northern District of California.

VI

CO-CONSPIRATORS

23. Various persons, firms, corporations or other business entities, known and unknown to plaintiffs, not made defendants participated as co-conspirators with the defendants in the violations alleged herein and performed acts and made statements in the furtherance thereof.

VII

BACKGROUND: CGL INSURANCE, REINSURANCE, STATE REGULATION AND ISO

A. *CGL Insurance*

24. Commercial General Liability ("CGL") insurance protects the insured from claims brought against it by others. For example, CGL insurance covers an accident involving a customer which occurs on a business' premises. The insured is the purchaser or consumer of the CGL insurance and is also known as the "risk." CGL insurance is purchased by businesses, non-profit groups and governmental entities such as cities or counties.

25. The basic insurance arrangement for CGL coverage is familiar. The contract between the insurance company and the insured is called a policy. The policy is written on a document known as a form. A policy is issued for a specific time period, e.g., one or three years, known as the policy period. Under the terms of the policy, the insurer agrees to pay valid claims which are covered by the policy. The insurer also agrees to pay a lawyer to defend the lawsuit and to bear other costs of the defense. The price the company charges for the policy is called a premium.

B. *Reinsurance*

26. Reinsurance is insurance for insurance companies. Only insurance companies purchase reinsurance. For a premium the reinsurance company agrees to indemnify

an insurance company for a portion of the risk originally assumed by the insurance company. The reinsurance company is known as the reinsurer and the insurance company is known as the primary or ceding company.

27. Reinsurance takes a variety of forms. The type of reinsurance most pertinent to this complaint is "treaty" reinsurance. Under a reinsurance treaty, the reinsurer agrees in advance with the reinsured to share a designated portion of specified classes of risks assumed by the reinsured during the treaty period. The treaty period may be any length of time, but is normally one year.

28. Reinsurance treaties are often underwritten by a number of reinsurers, each reinsurer assuming a percentage of the treaty's obligations.

29. Reinsurance serves at least two different purposes. One is to protect the primary insurance company from catastrophic losses. The other is to allow the primary insurance company to sell more insurance than its own financial capacity might permit without the reinsurance.

30. The principal markets for the supply of reinsurance of North American CGL risks are in the United States, London, and the European continent. The most important part of this London market is Lloyd's of London.

31. Lloyd's of London (Lloyd's) is composed of syndicates. Syndicates are separately capitalized, independently operated, competing firms. Lloyd's itself is not an insurance company, but rather a marketplace or exchange where syndicates transact their business. A "Lloyd's of London" policy may be underwritten by dozens of individual syndicates, each sharing a portion of the risk. The Lloyd's market provides reinsurance, as well as direct coverage in certain other unregulated markets in the United States.

32. Reinsurance is purchased by primary insurers either directly or through intermediary brokers. At

Lloyd's all reinsurance must be procured through a Lloyd's broker, admitted to the floor at the Lloyd's market.

33. In reinsurance markets, certain underwriters or firms, known as "lead" underwriters, are recognized as having special expertise in certain classes and lines of risks. A lead underwriter is the first to sign the reinsurance treaty, and normally establishes with a primary company's broker, or intermediary, the terms, conditions and price of the treaty. "Following" underwriters only join onto a treaty after a recognized lead reinsurer has signed off on the treaty. Lead underwriters therefore have an influence on the reinsurance market far beyond the percentage of the risks that they actually assume.

34. The availability of reinsurance affects the ability and willingness of primary insurers to provide insurance to their customers. Prudent insurers rely heavily on reinsurance to protect their balance sheets from unexpected losses.

C. *State Regulation of Insurance*

35. All fifty states regulate some aspects of the business of insurance. The extent of the regulation varies widely from state to state and depends on the type of insurance. Pursuant to state law, only "admitted" or licensed insurers such as defendants Hartford, CIGNA, Aetna, and Allstate are permitted to write CGL insurance, with one exception. That exception is for "surplus lines." Surplus lines are unusual lines of insurance for which coverage is nominally unavailable in the admitted market. For those lines, after the unavailability has been certified by a special broker, the policy may be written by a non-admitted company known as a surplus lines insurer. These non-admitted company policies are not regulated by the state.

36. States also do not regulate umbrella and excess coverages as to either forms or rates. Umbrella and excess insurance can be written by either admitted or non-admitted insurance companies, and are used by insurance consumers to obtain higher levels of protection for other liability insurance they may purchase.

37. Unlike primary insurance companies, the business of reinsurance companies is not regulated by the states, with only certain limited exceptions concerning financial solvency.

D. *Insurance Services Office*

38. The Insurance Services Office ("ISO") is a trade association consisting of approximately 1400 property/casualty insurers including defendants Hartford, Allstate, CIGNA, and Aetna. ISO was created in 1971 as a result of the merger of some eleven regional and national property and casualty rating bureaus. The member companies of ISO write approximately 95% of all casualty insurance written in the United States. These defendants have at all relevant times authorized ISO to file CGL policy forms with the California Insurance Commissioner.

39. ISO performs a variety of tasks for its member companies. Among other functions, it develops standard policy forms, collects historical loss and other data, projects future loss trends based on that data, and calculates advisory premium rates and rules for CGL and certain other lines of insurance.

40. ISO is headed by a Board of Directors and an Executive Committee which reports to the Board. Policy forms are developed by insurance company representatives sitting on standing committees such as the "Commercial Lines Committee." Defendants Hartford, Allstate, CIGNA, and Aetna all played leadership roles in the development of ISO CGL forms.

41. CGL insurance written by primary insurers in the United States, including defendants Hartford, Allstate,

Aetna and CIGNA, is predominately written on the ISO standard policy forms and coverage parts.

42. The dominance of the ISO CGL forms results from the monopoly position it has occupied since the 1971 merger referred to above. The first is ISO's actuarial function. ISO maintains a national statistical data base which records the actual performance ("loss history") of its policy forms in the marketplace.

43. For example with respect to the 1973 ISO CGL form, ISO collected, aggregated and interpreted data on the premiums charged, claims filed and paid, defense costs expended and many other categories of information which show precisely how this insurance product performed.

44. Applicable law in California, and other states also, permits ISO to act as a rating organization for its member companies. ISO projects future loss trends based on the data it has collected, and then calculates advisory rates for CGL and other lines of insurance.

45. Non-admitted companies in the surplus lines market often use ISO CGL forms, or parts thereof, to underwrite risks, including those of the plaintiff class.

VIII

TRADE AND COMMERCE AFFECTED

46. The activities of the defendants and their co-conspirators and the restraints which are the subject of this complaint were and are within the flow of, and substantially affect, interstate commerce as more particularly described below.

47. During the period covered by this complaint the defendant insurance companies sold CGL insurance throughout California and the United States. Their customers included, among others, corporations engaged in interstate commerce as well as state and local governmental entities. In 1986, CGL insurance premiums in the United States were $24.1 billion. Defendants Hartford, Allstate, Aetna, and CIGNA are providers of CGL insurance in California and throughout the United States.

48. Defendant reinsurance companies and syndicates provide reinsurance for CGL insurance and property insurance policies throughout California and the United States. Approximately one half of Lloyd's business covers North American risks. Income from U.S. CGL and property reinsurance premiums constitutes a substantial portion of all reinsurance premium income in both the U.S. and London.

49. During the period covered by this complaint, the sale of CGL insurance and reinsurance involved the following, among other things:

(a) Various channels of interstate communication, including telephone lines and the mails, were regularly used in the purchases of CGL and property insurance and reinsurance and in the development of the ISO CGL insurance forms described in this complaint;

(b) A substantial amount of the CGL insurance and property insurance that was purchased by plaintiffs came from outside California.

(c) Insurance forms for the sale of CGL insurance were developed by defendant ISO and other defendants, which forms were filed or lodged with the insurance regulators of each State of the United States;

(d) A substantial quantity of CGL insurance was sold nationwide on forms developed by defendant ISO; and

(e) Each defendant insurance company purchases a substantial quantity of reinsurance from outside the State in which it is located.

50. The illegal conduct challenged herein has had and may be expected to continue to have a not insubstantial effect on interstate trade and commerce as described in this complaint.

IX

FACTS

A. *The 1973 ISO Occurrence Form*

51. The conspiracies alleged herein occurred after ISO undertook to revise its standard CGL insurance form that had been in use since 1973.

52. The 1973 ISO form employed the traditional "occurrence" trigger of coverage that had long been used for CGL insurance. The standard occurrence policy language obligated the insurance company to pay or defend claims, whenever made, resulting from an accident or "injurious exposure to conditions" that occurred during the period the policy was in effect.

53. The 1973 ISO form covered claims relating to "sudden and accidental" pollution.

54. Another key provision of the 1973 ISO CGL form was that legal costs of defending claims were borne by the insurance company rather than the insured. A 1973 CGL policy for $1,000,000 worth of insurance coverage would provide fully that much protection for the insured, even if it cost $500,000 or even $1,000,000 in legal expenses to defend the claim.

55. In 1977 ISO began a project to substantially revise the 1973 occurrence form. This process resulted in a new set of CGL forms filed or lodged with state insurance regulators in March, 1984.

B. *The 1984 ISO Forms*

56. The 1984 ISO CGL forms differed from the 1973 ISO CGL form in one key respect relevant to this complaint: for the first time ISO filed two alternative CGL

forms, one with a traditional "occurrence" trigger of coverage and a second with a new "claims-made" trigger.

57. The "claims-made" concept was a major change in the way CGL insurance had always been written. The trigger of coverage for the occurrence form focused on when the accident or event itself *occurred* and it did not matter when the notice of the claim actually reached the insurance company. The trigger of coverage for the "claims-made" policy, on the other hand, was the *receipt* of the claim by the insurer. If the claim came in during the period the policy was in effect, it was covered. If the claim was filed after the policy had expired, it was not covered. Coverage for these future claims is entirely dependent upon the insured's ability to purchase claims-made CGL insurance in succeeding years.

58. The claims-made form provides much less protection against long tail losses than an "occurrence" form. It shifts the risk of uncertainty for claims filed in the future from the insurer to the insured. Claims-made policies can be used by insurers to cut off liability for claims reported in the future by refusing insurance renewals to insureds who experience an increased or unexpected trend in claims.

59. As originally filed by ISO, the 1984 claims-made CGL form did not include a "retroactive date" provision. Inclusion of a "retroactive date" provision has the effect of cutting of all coverage for occurrences prior to the retroactive date. Without a retroactive date an injury in 1976 that was not filed with the insurance company until 1984 would be covered by the 1984 claims-made policy.

60. Other key aspects of the two 1984 ISO forms, however, were identical to the 1973 CGL form. Most important, both new forms continued to cover damage caused by "sudden and accidental" pollution. In addition, legal defense costs would continue to be borne by the insurance company without regard to the policy limit.

61. Within ISO, defendant Hartford opposed the proposed CGL forms on the grounds that: (a) the occurrence form should have been eliminated entirely in favor of issuing solely a claims-made form; (b) the claims-made form should have included a standard retroactive date provision; (c) pollution coverage should have been totally excluded by elimination of the coverage for "sudden and accidental" pollution coverage; and (d) defense costs payable under the policy by the insurer should have been limited by including defense costs within the policy limits. Defendant Allstate opposed the claims-made form because it contained no standard retroactive date provision.

62. The majority of ISO Executive and Commercial Lines Committee members, however, supported the proposed CGL forms and rejected the changes proposed by defendants Hartford and Allstate. On December 15, 1983 the new CGL forms were approved by the ISO Board of Directors. ISO filed or lodged the two new CGL forms with state regulators in March, 1984.

C. *RAA's Response to the 1984 Forms*

63. After their positions were rejected by a majority of ISO, certain primary insurance companies, including defendants Hartford, CIGNA, Aetna and Allstate, exerted concerted pressure on ISO staff and other ISO Company members in an effort designed to have the CGL forms withdrawn and to restrict CGL coverage available to the consumer under any new CGL forms.

64. On March 2, 1984 representatives of Hartford met with representatives of General Re, the largest American reinsurer. The purpose of the meeting was to formulate a joint strategy to force changes in the 1984 ISO CGL forms. At this meeting Hartford and General Re agreed to either coerce ISO to adopt their demands or, failing that, "derail" the entire ISO CGL forms program.

65. At an RAA Executive Committee meeting held March 13, 1984, in furtherance of its agreement with Hartford, General Re initiated a coordinated effort with the RAA to force revisions in the ISO CGL forms program. As part of their effort, on May 26, 1984 the RAA Executive Committee created a "CGL Committee" consisting of defendants General Re, Mercantile & General, Constitution Re, North American Re and Winterthur Swiss.

66. At a June 15, 1984 meeting of the RAA "CGL Committee," defendants named in paragraph 65 agreed to boycott the 1984 ISO forms unless a retroactive date was added to the claims-made form, and a pollution exclusion and a defense cost cap were added to both forms.

67. In a letter to ISO dated June 19, 1984, RAA announced that its members would not provide reinsurance for coverages written on the 1984 CGL forms.

68. Defendants General Re and Hartford also enlisted Thomas A. Greene, President of defendant Thomas A. Greene & Co., Inc., to announce the boycott message to ISO in a widely-reported speech to the ISO Board of Directors on June 21, 1984. Greene stated that no reinsurers would "break ranks" to reinsure the 1984 ISO CGL forms.

D. *Lloyd's of London's Response*

69. Defendants Hartford, Aetna, CIGNA and Allstate, in addition to conspiring with General Re and the RAA, also encouraged a boycott of the 1984 CGL forms by key Lloyd's of London syndicates, including the lead underwriters for North American casualty reinsurance. As with the RAA conspiracy, the common goal of the London reinsurers, as well as the primary insurer defendants, was to coerce ISO and its members to withdraw the 1984 CGL forms and issue a more restrictive CGL form. These anticonsumer restrictions would include an end to all coverage for pollution liability and the addition of a retroactive date on a new claims-made form.

70. Defendants Hartford, Allstate, CIGNA, Aetna and others communicated to several lead Lloyd's of London syndicates, including defendants Merrett Syndicates, Edwards and Payne (U.A.) Ltd., and Three Quays Underwriting Management Ltd., their desire to restrict the ISO CGL coverage.

71. As early as April 23, 1984 ISO learned that defendant Robin Jackson of Merrett Syndicates, Ltd., a highly renowned lead underwriter in the North American casualty reinsurance market, was planning to withhold reinsurance from the market for primary companies using the new ISO forms.

72. In late May 1984, ISO, in recognition of Lloyd's power as a reinsurer of the United States CGL market, arranged a visit to London for July, 1984 to explain and promote the March filed forms to the London market.

73. Prior to the July London meetings, Hartford and Allstate enlisted the aid of intermediary brokers Thomas A. Greene, and Nick Graham of R.K. Carvill & Co. to maximize the London reinsurance market's pressure on ISO to change its CGL forms.

74. While ISO staff were in London to discuss the March 1984 ISO CGL forms, London reinsurers including Tim Holloway and J. Brian Hose & Others Ltd. and Cyril Warrilow of C.J. Warrilow—Hine & Butcher, Ltd., threatened a boycott of North American CGL risks unless four key demands were met:

(a) The elimination of any ISO CGL occurrence form;

(b) The addition of a retroactive date to a new revised CGL claims-made form;

(c) The exclusion of any pollution liability coverage from any CGL form; and

(d) Defense costs within limits.

75. These demands were conveyed to ISO staff in meetings with individual syndicates and companies in the London market, and at a dinner at the Garrick Club hosted by ISO on July 4, 1984. In attendance at the dinner were the leading Lloyd's underwriters of U.S. casualty reinsurance, including Robin A.G. Jackson of the Merrett Syndicates, Richard Hazell of Three Quays Syndicate, Charles Skey of the Edwards and Payne Syndicates and Gale Coles of the Janson, Greene Syndicate. ISO staff reported that the dinner attendees were "almost militant" in their resolve to eliminate coverage of CGL risks on the occurrence form.

76. After returning from London, ISO staff met with defendant Hartford at its headquarters in Connecticut. By this time the threat of a reinsurance boycott unless key changes were made in the 1984 ISO CGL forms was known within ISO as "the Hartford problem." Defendant Hartford continued to insist upon the coverage restriction revisions described in paragraphs 61 and 74.

77. Sometime between August 12 and August 22, 1984, ISO staff, in a reversal of its own previous position on these matters, agreed to recommend that key provisions of the 1984 CGL forms be reconsidered and revised as demanded. On August 23, 1984, under pressure from defendants, the Commercial Lines Committee of ISO capitulated and reversed its positions on the retroactive date and pollution exclusion. Later that same day, the ISO Executive Committee decided that a final decision on these revisions to the forms should await their next meeting on September 20, 1984.

E. *The September 20, 1984 Agreement*

78. As demanded on August 23rd by defendants Hartford and Aetna, ISO invited representatives of both the foreign and domestic casualty reinsurance markets to the September 20, 1984 Executive Committee meeting. Never before had representatives of the domestic or foreign re-

insurance markets been invited to speak at an ISO Executive Committee meeting.

79. Eight representatives of what were major sources of reinsurance for all of ISO's member companies were invited to attend both the September 20 meeting and a dinner with the Committee to be hosted by ISO the evening before. These representatives were:

(a) Ronald Ferguson and John Etling, Chairman and President, respectively, of General Re;

(b) N. David Thompson, President of North American Re;

(c) George Nimmo, President of Prudential Re and the Chairman of the RAA at the time;

(d) Andre Maisonpierre, President of RAA;

(e) Robin Jackson of the Merrett Syndicates;

(f) Richard Hazell of Three Quays Ltd.; and

(g) Gale Coles of the Janson, Greene Syndicates.

ISO staff also contacted six other Lloyd's reinsurers and encouraged them to convey their views on the scheduled issues to Jackson, Hazell and Coles.

80. During the evening of September 19, 1984 Ferguson and Etling of General Re, Thompson of North American Re, Nimmo of Prudential Re and Chairman of the RAA, Maisonpierre, the RAA president, and ISO officers dined at the Board Room, a private club in New York City. At this dinner the reinsurers communicated to ISO Board Members present their agreed positions on the CGL revision issues set for an ISO Executive Committee vote the next day.

81. Of the eight reinsurer representatives invited by ISO, only Hazell and Coles could not attend the September 20 meeting. With advance knowledge of this fact in mind, ISO had urged Hazell and Coles to convey their views to

Jackson before the meeting. Jackson conferred with at least Hazell and Coles before attending the meeting at ISO's headquarters in New York.

82. At the ISO Executive Committee meeting of September 20, 1984 the foreign and domestic reinsurer representatives presented their agreed upon positions that there would be changes in the CGL forms or no reinsurance.

83. As of September 20, 1984 ISO members were already aware of emerging capacity problems in the CGL reinsurance markets and the difficulties they would face in the renewal of their casualty treaties for 1985. A reinsurance boycott at that time would be devastating for ISO members.

84. After the reinsurance representatives spoke, the ISO Executive Committee voted to include a retroactive date in the claims-made form, to exclude all pollution coverage from both new forms, and to defer to a later date the revision of the forms on the defense cost containment issue. ISO did not change its existing plan to offer a new occurrence form along with the new claims-made form. The 1984 ISO CGL forms were thereafter withdrawn from the marketplace and replaced with new substitute CGL forms which include the coverage restrictions insisted upon by the defendant reinsurers and insurance companies. The final version of the revised forms were filed and/or lodged with state regulators in 1986.

85. In furtherance of the agreements reached on September 20, 1984, defendants ISO, Hartford, Aetna, and a "London reinsurer" combined to form an "ISO Team" to market the new forms. This scheme included coordinated speeches before groups of insurance brokers and agents to convince them that a reinsurance boycott, and thus loss of income to the agents and brokers who would be unable to find available markets for their customers, would ensue if the ISO forms were not approved. The scheme also

included plans to effect their agreement to add a defense within limits provision to the CGL forms.

F. *The Occurrence Form Boycott*

86. Even after their victory at the ISO Executive Committee meeting on September 20, 1984, defendant Peter North Miller, defendant Lloyd's reinsurers, including Robin A.G. Jackson of the defendant Merrett Syndicates and Richard Hazell of defendant Three Quays Syndicates, defendants Janson, Green, Ltd., Edwards and Payne Syndicates, Ballantyne, McKean & Sullivan, Ltd. and their co-conspirators, continued their attempt to eliminate the occurrence form as an option for most risks and to make the restrictive claims-made form the standard CGL policy form.

87. As a means of coercing the insurance market to accept the claims-made form, Lloyd's reinsurers employed two primary strategies:

a) public and private pronouncements that there would be no reinsurance for primary insurers writing on the occurrence form, and

b) the redesign of reinsurance treaties to eliminate coverage for "long tail" risks, thereby leaving the primary insurer without reinsurance protection for claims reported in the future. This exclusion became known as the "sunset clause".

88. In furtherance of the first strategy, Lloyd's reinsurers, including lead underwriters Robin Jackson and Richard Hazell, collectively refused to write new treaties for or to renew long-standing treaties with, primary U.S. insurers unless they were prepared to switch from the occurrence to the claims-made form. Primary insurers who did not evidence a strong intention to commit to claims-made were left either without reinsurance coverage or with very low limits of coverage, even though the

claims-made form itself had not yet been approved for use in many jurisdictions.

89. Representatives of Lloyd's including defendant Peter North Miller, then, and at all relevant times, the Chairman of Lloyd's, also appeared in various public forums and in the trade press to present their agreed upon position that Lloyd's of London was withdrawing entirely from the business of reinsuring primary U.S. insurers who wrote on the occurrence form. In furtherance of this effort, Robin Jackson circulated a series of letters to brokers, clients and fellow reinsurance syndicates pressing for further changes in the ISO forms, including the elimination of the option of an occurrence form for any CGL risk.

90. A second stratagem employed by Lloyd's of London reinsurers, including defendants, was to impose a "sunset clause" restriction within their treaties with U.S. primary insurance companies that effectively eliminated coverage for "long tail" risks written on the occurrence form.

91. After the so-called "sunset date", reinsurance coverage expires and the U.S. primary insurer becomes fully answerable for all losses without the benefit of reinsurance indemnity. The "sunset clause" was intended to force primary insurers to stop writing occurrence coverage, and to substitute claims-made coverage, for all risks except very small risks.

92. During 1985 and early 1986, London reinsurers, acting in conjunction with intermediary brokers, including defendant Ballantyne, McKean and Sullivan, Ltd., combined to impose sunset clauses in reinsurance treaties for U.S. primary casualty insurance written on an occurrence form basis.

G. *The Pollution Liability Coverage Boycott*

93. In addition to the boycott of the occurrence form in general, by no later than January 1, 1986, reinsurers in London also boycotted reinsurance for pollution lia-

bility coverage in particular, even if written on a claims-made form. This conspiracy had the effect of drastically restricting the availability and affordability of pollution liability coverage in the United States, including California.

94. The boycott was accomplished by joint agreement between lead Lloyd's of London underwriters and leading reinsurance firms in the London company market to exclude all pollution liability coverage from "casualty" reinsurance treaties, beginning at least by late 1985 and continuing to the present. Participating Lloyd's syndicates included the defendants Merrett Syndicates, Three Quays Syndicates, Edwards and Payne Syndicates, C.J. Warrilow —Hine and Butcher Ltd., Harvey Bowring—Murray Lawrence & Partners, K.F. Alder and Others, and D.P. Mann and Others. Participating London company market defendants included Unionamerica Insurance Co., CNA Re (U.K.) and Terra Nova Insurance Co.

95. On November 6, 1985, at a meeting of these lead underwriters at the offices of defendant Ballantyne, McKean and Sullivan, Ltd., those present agreed that all North American casualty reinsurance treaties, including coverage for CGL, would be written with a total pollution exclusion.

96. The complete exclusion of pollution coverage from casualty reinsurance treaties had a direct impact on U.S. primary insurers and insurance buyers. Insurance consumers that had potential pollution liability exposures, such as municipalities, could not find primary insurers willing to provide even "sudden and accidental" coverage for such consumers.

H. *ISO's Withdrawal Of Support For The 1973 CGL Forms*

97. As a result of the boycott, coercion and intimidation described herein, ISO succeeded in obtaining regulatory approval in most states where such approval is

needed for its revised CGL forms, both a new revised occurrence form and the revised claims-made form.

98. In California there is no regulatory approval process for CGL forms and as such no approval was sought or obtained.

99. On July 1, 1987, ISO officially withdrew its "support" of the 1973 CGL form. "Support" in this context includes the normal data collection and actuarial services performed by ISO in aid of its member companies. Without such support, most ISO members could not continue to use the 1973 occurrence form, because it is very difficult and expensive for any single company to duplicate the critical ISO support functions.

100. Although many insurance consumers preferred the 1973 CGL forms, the market for this type of coverage has all but disappeared.

I. *ISO's Standardized CGL Insurance Policy For The Excess And Umbrella Markets*

101. Beginning no later than November 10, 1985, ISO staff and ISO members, including defendants Hartford, Aetna and CIGNA, agreed that ISO staff should begin developing standardized CGL umbrella and excess policy language. This decision was made despite the fact that ISO, as the trade association for admitted property/casualty primary insurance companies, plays no authorized role in the unregulated excess and umbrella markets. "Excess" insurance is a specialized form of insurance normally not offered by admitted insurers on a regulated basis. "Excess" refers to a layer of insurance, a higher level of indemnity protection, that sits on top of either a self-insurance program, often referred to as a "retention", or a primary insurance policy. "Umbrella" coverage is similar to excess insurance and likewise is not normally offered on a regulated basis.

102. After the introduction of the new versions of the ISO CGL forms, ISO had begun to receive pressure from domestic reinsurers, London reinsurers, and others to develop standardized policy language for CGL excess and umbrella forms which would conform to the revised ISO CGL forms.

103. On January 14, 1986, the ISO Board of Directors approved a recommendation that the ISO staff develop standardized excess and umbrella policy forms language for broad distribution.

104. Early drafts of the standardized policy language were written by defendant Allstate, co-conspirator Safeco, ISO staff members and others. Comments were solicited and received from defendants Merrett Syndicates, Three Quays Syndicates, co-conspirator H.S. Weavers Underwriting Agencies Ltd., (a leading London company market excess insurer) and others in the reinsurance and excess insurance markets.

105. On June 15, 1986 the ISO Executive Committee released standardized Model CGL excess and umbrella policy language, coverage parts and endorsements with the following provisions, among others:

a) a retroactive date in the claims-made version;

b) an absolute pollution exclusion in both versions; and

c) defense costs within the policy limits for both versions.

J. *The Pollution Property Coverage Boycott*

106. Specialized reinsurers in London and the United States have also subsequently agreed to boycott reinsurance and insurance policies for U.S. and Canadian property seepage and pollution exposures. These companies include Unionamerica Insurance Co., Ltd., Terra Nova Insurance Co., Ltd., Excess Insurance Co., Ltd., Edwards

and Payne Syndicates Ltd., Kemper Reinsurance London Ltd., Merrett Syndicates, Ltd., Continental Re (U.K.) Ltd., and other unnamed co-conspirators. This conspiracy has had the effect of drastically restricting the availability and affordability of property pollution coverage in the United States, specifically including California.

107. The agreement to boycott the provision of property pollution insurance and reinsurance for North American exposures is memoralized in a document entitled "Non Marine London Market Agreement 1987" (hereinafter "Market Agreement"). This Market Agreement is signed by over forty LMX Retrocessional reinsurers both at Lloyd's and in the London Company Market. Retrocessional reinsurance means the reinsurance of the business written by reinsurers, while "LMX" is the short hand for those retrocessional reinsurers who specialize in providing such reinsurance for the Lloyd's and London Company Market Companies.

108. The parties to the Market Agreement agreed to use their "best endeavors to ensure that all U.S.A. and Canadian exposed insurance reinsurance business attaching on or after 1st January, 1987 will only be written where the original business includes a seepage and pollution exclusion wherever legal and applicable."

109. The Market Agreement to boycott property pollution coverage was subsequently agreed to by at least twenty-nine North American retrocessional reinsurers of the LMX Market.

110. The agreed upon exclusion of seepage and pollution risks from property insurance and reinsurance policies has had a direct impact on U.S. primary insurers and insurance buyers. Insurance consumers who sought coverage for property exposures were no longer able to find primary insurers willing to provide such coverage.

FIRST CLAIM FOR RELIEF

DOMESTIC CONSPIRACY

(CONSPIRACY OF PRIMARY INSURERS, THE RAA AND MEMBERS OF THE RAA TO COERCE ISO TO ADOPT RESTRICTIVE TERMS AND CONDITIONS IN ITS CGL FORMS)

111. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-68 above with the same force and effect as if here set forth in full.

112. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants RAA, General Re, Constitution Re, Mercantile and General Re, Prudential Re, North America Re, Winterthur Swiss, Hartford, Allstate, CIGNA, Aetna, Thomas A. Greene & Co., Inc. and other co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks and the market for primary coverage of CGL risks.

113. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to restrict the terms under which reinsurance coverage would be provided for CGL risks; and

(b) to refuse to provide reinsurance coverage for CGL risks unless ISO agreed to amend its 1984 CGL forms to incorporate defendants' terms.

114. For the purpose of forming and effectuating such contracts, combination and conspiracies, defendants named in paragraph 112 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) conducting meetings and discussions among themselves to agree on the terms under which they would reinsure CGL risks;

(b) agreeing to boycott the 1984 ISO CGL forms, unless they were amended to comply with defendants' terms; and

(c) coercing and intimidating ISO and ISO members to adopt the coverage terms and exclusions agreed upon by defendants.

115. This contract, combination and conspiracy has had the following effects, among others:

(a) the standard ISO CGL policy available in the State of California excludes all pollution liability coverage;

(b) the standard CGL claims-made policy available in the State of California excludes retroactive coverage;

(c) the price of pollution liability coverage, where it is available, has been increased;

(d) competition in the market for pollution liability coverage and retroactive claims-made coverage has been unreasonably restrained.

SECOND CLAIM FOR RELIEF

FOREIGN CONSPIRACY

(CONSPIRACY OF LLOYD'S OF LONDON REINSURERS AND PRIMARY INSURERS TO COERCE ISO TO ADOPT RESTRICTIVE TERMS AND CONDITIONS IN ITS CGL FORMS)

116. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-77 above with the same force and effect as if here set forth in full.

117. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Merrett (U.A.) Mgt., Ltd., Robin A.G. Jackson, Three Quays Underwriting Management Ltd., Janson, Green, Ltd., Edwards and Payne (U.A.), Ltd., C.J. Warrilow-Hine & Butcher, Ltd., J. Brian Hose & Others, Ltd., J. Brian Hose & Others, Ltd., R.K. Carvill & Co., Hartford, Allstate, CIGNA, Aetna, Thomas A. Greene & Co., Inc., and other co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks and the market for primary coverage of CGL risks.

118. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to restrict the terms under which reinsurance coverage would be provided for CGL risks; and

(b) to refuse to provide reinsurance coverage for CGL risks unless ISO agreed to amend its 1984 CGL forms to incorporate defendants' terms.

119. For the purpose of forming and effectuating such contracts, combinations and conspiracies, defendants named in paragraph 117 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) conducting meetings and discussions among themselves to agree on the coverage terms and exclusions under which they would reinsure North American CGL risks;

(b) agreeing to boycott the 1984 ISO CGL forms unless they were amended to comply with defendants' terms; and

(c) coercing and intimidating ISO and ISO members to adopt the coverage terms and exclusions agreed upon by defendants.

120. The aforesaid contract, combination and conspiracy has had the following effects, among others:

(a) the standard ISO CGL policy available in the State of California excludes all pollution liability coverage;

(b) the standard CGL claims-made policy available in the State of California excludes retroactive coverage;

(c) the price of pollution liability coverage, where it is available, has been increased;

(d) competition in the market for pollution liability coverage and retroactive claims-made coverage has been unreasonably restrained.

THIRD CLAIM FOR RELIEF

JOINT CONSPIRACY

(CONSPIRACY OF PRIMARY INSURERS, RAA MEMBERS AND LLOYD'S OF LONDON REINSURERS TO COERCE ISO TO ADOPT RESTRICTIVE TERMS AND CONDITIONS IN ITS CGL FORMS)

121. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-83 above with the same force and effect as if here set forth in full.

122. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Merrett (U.A.) Mgt. Ltd., Robin A.G. Jackson, Three Quays Underwriting Management Ltd., Janson, Green, Ltd., Edwards and Payne (U.A.), Ltd., RAA, General Re, Constitution Re, Mercantile and General Re, Prudential Re, North American Re, Winterthur Swiss, Hartford, Allstate, CIGNA, Aetna, Thomas A. Greene & Co., Inc. R.K. Carvill & Co. and other co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for reinsur-

ance coverage of CGL risks and the market for primary coverage of CGL risks.

123. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to restrict the terms under which reinsurance coverage would be provided for CGL risks; and

(b) to refuse to provide reinsurance coverage for CGL risks unless ISO agreed to amend its 1984 CGL forms to incorporate defendants' coverage terms and exclusions.

124. For the purpose of forming and effectuating such contracts, combinations and conspiracies, defendants named in paragraph 122 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) conducting meetings and discussions among themselves to agree on the terms under which they would reinsure CGL risks and jointly communicating those terms to the ISO Executive Committee on September 20, 1984;

(b) agreeing to boycott the proposed 1984 ISO CGL forms unless they were amended to comply with defendants' terms; and

(c) coercing and intimidating ISO and ISO members to adopt the terms agreed upon by defendants.

125. The aforesaid contract, combination and conspiracy has had the following effects, among others:

(a) the standard ISO CGL policy available in the State of California excludes all pollution liability coverage;

(b) the standard CGL claims-made policy available in the State of California excludes retroactive coverage;

(c) the price of pollution liability coverage, where it is available, has been increased; and

(d) competition in the market for pollution liability coverage and retroactive claims-made coverage has been unreasonably restrained.

FOURTH CLAIM FOR RELIEF

GLOBAL CONSPIRACY

(CONSPIRACY OF ISO, PRIMARY INSURERS, RAA MEMBERS AND LLOYD'S OF LONDON REINSURERS TO STANDARDIZE THE TERMS AND CONDITIONS OF CGL INSURANCE COVERAGE)

126. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-85 above with the same force and effect as if here set forth in full.

127. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants ISO, Merrett (U.A.) Mgt., Ltd., Robin Jackson, Three Quays Underwriting Management Ltd., Janson, Green, Ltd., Edwards and Payne (U.A.), Ltd., RAA, General Re, Constitution Re, Mercantile and General Re, Prudential Re, North American Re, Winterthur Swiss, Hartford, Allstate, CIGNA, Aetna, Thomas A. Greene & Co., Inc., R.K. Carvill Co., Ltd., and other co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks and the market for primary coverage of CGL risks.

128. This contract, combination and conspiracy consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to eliminate pollution coverage from the 1984 ISO CGL forms, as had been demanded by the defendants named above,

(b) to eliminate retroactive coverage from the 1984 ISO CGL claims-made form;

(c) to agree to limit defense costs to the limits of the policy in any ISO CGL policy form.

129. For the purpose of forming and carrying out this contract, combination and conspiracy, the defendants named in paragraph 127 and co-conspirators did those things which they conspired to do, including, but not limited to:

(a) conducting meetings and discussions among themselves to agree on the terms to be included in the ISO CGL forms; and,

(b) agreeing to incorporate the retroactive date coverage term and pollution liability exclusion language in the 1986 ISO forms.

(c) agreeing to further revise the ISO CGL forms to provide for defense costs within limits, but agreeing to delay each revision until the changes in the retroactive date and pollution exclusion terms were introduced to the market and insurance regulators, where necessary.

130. This contract, combination and conspiracy has had the following effects, among others:

(a) the standard ISO CGL policies available in the State of California incorporate terms demanded by defendants, i.e. a pollution exclusion and a retroactive date;

(b) the price of pollution liability coverage and retroactive claims-made coverage, where it is available, has increased;

(c) competition in the markets for pollution liability coverage and retroactive claims-made coverage has been unreasonably restrained; and

(d) defense within limits is, or will be, a standard provision of CGL policies.

FIFTH CLAIM FOR RELIEF

CONSPIRACY OF LLOYD'S OF LONDON REINSURERS TO COERCE PRIMARY INSURERS TO OFFER COVERAGE ON A CLAIMS-MADE BASIS

131. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-92 above with the same force and effect as if here set forth in full.

132. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Peter North Miller, Robin A.G. Jackson, Merrett (U.A.) Mgt., Ltd., Three Quays Underwriting Management Ltd., Janson, Green, Ltd., Edwards and Payne (U.A.) Ltd., Ballantyne, McKean and Sullivan, Ltd. and other co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks written on the occurrence form and the market for primary coverage of CGL risks on the occurrence form.

133. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to restrict the terms under which reinsurance coverage would be provided for CGL risks;

(b) to refuse to reinsure those CGL risks written on an occurrence form; and

(c) to eliminate reinsurance coverage for "long-tail" risks covered by occurrence policies.

134. For the purpose of forming and effectuating such contracts, combinations and conspiracies, defendants named in paragraph 132 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) conducting meetings and discussions among themselves to agree on the terms under which reinsurance would be made available for North American CGL risks;

(b) agreeing to structure, promote and publicize a boycott of reinsurance for North American CGL risks by refusing to reinsure any other than those risks written on a claims-made CGL form, or by offering such reinsurance only when it was itself written on a claims-made basis; and

(c) coercing and intimidating primary insurers to use the claims-made form and reject the occurrence form; and

(d) coercing and intimidating individuals who had spoken to, or had reason to so address, or might have commercial interest in speaking to, regulatory and/or legislative bodies or officials concerning that body's or official's approval of the adoption or use of the claims-made CGL form so as to influence or determine said individual's presentation to said officials or bodies.

135. The aforesaid contract, combination and conspiracy has had the following effects, among others:

(a) the market for occurrence CGL coverage available in the State of California was unreasonably restrained;

(b) occurrence CGL coverage became unavailable in the State of California for many risks, including municipal general liability risks;

(c) the price of occurrence liability coverage, where it is available, has been increased.

SIXTH CLAIM FOR RELIEF

POLLUTION BOYCOTT I

(CONSPIRACY OF LLOYD'S OF LONDON REINSURERS, BROKERS AND LONDON COMPANY MARKET REINSURERS TO BOYCOTT POLLUTION COVERAGE)

136. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-100 above with the same force and effect as if here set forth in full.

137. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants, Merrett (U.A.) Mgt., Ltd., Harvey Bowring, Ltd.—Murray Lawrence & Partners; K.F. Alder and Others (U.A.), Ltd., Edwards and Payne (U.A.), Ltd., D.P. Mann and Others (U.A.) Ltd., C.J. Warrilow-Hine and Butcher, Ltd., Unionamerica Insurance Company, Ltd., Terra Nova Insurance Co., Ltd., CNA Re (U.K.) Ltd., and Ballantyne, McKean and Sullivan, Ltd., and other co-conspirators, have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for casualty reinsurance coverage for pollution risks and the market for primary casualty coverage of pollution risks.

138. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to restrict the terms under which casualty reinsurance coverage would be provided for CGL risks;

(b) to limit the availability of pollution coverage in U.S. primary casualty insurance.

139. For the purpose of forming and effectuating such contracts, combination and conspiracies, defendants named in paragraph 137 and co-conspirators did those things

which they combined and conspired to do, including but not limited to the following:

(a) conducting meetings and discussions among themselves to agree on the exclusive terms under which they would reinsure North American CGL risks;

(b) agreeing to exclude from all casualty treaty reinsurance written in London all pollution coverage for North American risks.

140. This contract, combination and conspiracy has had the following effects, among others:

(a) pollution liability coverage has become almost entirely unavailable for the vast majority of casualty insurance purchasers in the State of California;

(b) the price paid by plaintiffs for pollution liability insurance coverage, where it is available, has dramatically increased; and

(c) competition in the market for pollution liability coverage has been unreasonably restrained.

SEVENTH CLAIM FOR RELIEF

(CONSPIRACY BY ISO, REINSURERS AND INSURERS TO RESTRAIN TRADE IN THE COMMERCIAL UMBRELLA AND EXCESS INSURANCE MARKETS)

141. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-105 above with the same force and effect as if here set forth in full.

142. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, defendants ISO, Allstate, Hartford, Aetna, Merrett (U.A.) Mgt., Ltd. and Three Quays Underwriting Management Ltd, and unnamed co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the markets for commercial umbrella and excess insurance coverages.

143. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were to restrict terms and conditions under which insurance coverages would be available to purchasers of commercial umbrella and excess insurances.

144. For the purpose of forming and effectuating such contracts, combinations and conspiracies, defendants named in paragraph 142 and their co-conspirators did those things which they combined and conspired to do, including, but not limited to, the following:

(a) Conducting meetings and discussions among themselves to agree to draft "Model" forms and policy language for both umbrella and excess insurance coverages;

(b) Agreeing upon, drafting, and then promulgating such "Model" forms and policy language for use in the umbrella and excess insurance markets.

145. This aforesaid contract, combination and conspiracy has had the following effect, among others:

(a) Competition in the unregulated markets for commercial umbrella and excess insurance has been unreasonably restrained.

EIGHTH CLAIM FOR RELIEF

POLLUTION BOYCOTT II

(LLOYD'S OF LONDON, LONDON COMPANY MARKET AND DOMESTIC RETROCESSIONAL REINSURER BOYCOTT OF PROPERTY POLLUTION COVERAGES)

146. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-110 above with the same force and effect as if here set forth in full.

147. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Unionamerica Insurance Co., Ltd., Terra Nova Insurance Co., Ltd., Excess Insurance Group Ltd., R.A. Edwards Syndicates Ltd., Kemper Reinsurance London Ltd., Merrett (U.A.) Management Ltd., Continental Reinsurance Co. (U.K.) Ltd., and unnamed co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for property insurance coverages for seepage, pollution and contamination exposures situated in North America, including the State of California.

148. This contract, combination and conspiracy consisted of a continuing agreement, understanding and concert of action among such defendants and their co-conspirators, the substantial terms of which were:

(a) to restrict the terms under which property insurance and reinsurance coverage would be provided for North American risks;

(b) to limit the availability of property insurance and reinsurance for North American risks.

149. For the purpose of forming and effectuating such contracts, combinations and conspiracies, defendants named in paragraph 147 and their co-conspirators did those things which they combined and conspired to do, including, but not limited to, the following:

(a) conducting meetings and discussions among themselves to agree to coverage terms and exclusions for primary and reinsurance coverages for North American property insurance;

(b) agreeing to boycott the provision of all retrocessional reinsurance for any U.S. or Canadian primary or reinsurance property coverages unless the original insurance coverage includes a seepage, pollution and contamination exclusion clause;

150. This contract, combination and conspiracy has had the following effects, among others:

(a) property insurance and reinsurance policies written for U.S. and Canadian property risks, including all such risks in the State of California, now exclude a seepage, pollution and contamination clause;

(b) the prices for seepage, pollution and contamination property insurance coverages, where they are still available, have been increased;

(c) competition in the market for property seepage, pollution and contamination coverages has been unreasonably restrained.

NINTH CLAIM FOR RELIEF

STATE LAW CLAIM I

(VIOLATIONS OF THE CARTWRIGHT ACT, CALIFORNIA BUSINESS & PROFESSIONS CODE § 16700 ET SEQ.)

151. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-150 above with the same force and effect as if here set forth in full.

152. The aforesaid agreements, combinations, and conspiracies in unreasonable restraint of trade and commerce are in violation of California Business and Professions Code section 16720 et seq., commonly known as the Cartwright Act.

TENTH CLAIM FOR RELIEF

STATE LAW CLAIM II

(VIOLATIONS OF THE UNFAIR INSURANCE TRADE PRACTICES ACT, CALIFORNIA INSURANCE CODE § 790 ET SEQ.)

153. Plaintiffs repeat and reallege every allegation contained in paragraphs 1-150 above with the same force and effect as if here set forth in full.

154. The aforesaid agreements, combinations and conspiracies in unreasonable restraint of trade and commerce are in violation of California Insurance Code section 790 et seq., commonly known as the Unfair Insurance Trade Practices Act.

ELEVENTH CLAIM FOR RELIEF

STATE LAW CLAIM III

(VIOLATIONS OF THE UNFAIR COMPETITION ACT, CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200 ET SEQ.)

155. Plaintiffs repeat and realleges each and every allegation contained in paragraphs 1-154 above with the same force and effect as if here set forth in full.

156. The aforesaid agreements, combinations, and conspiracies in unreasonable restraint of trade and commerance and said violations of federal and state law are violations of California Business and Professions Code section 17200 et seq., commonly known as the Unfair Competition Act.

PRAYER FOR RELIEF

Wherefore, plaintiffs pray for judgment as follows:

157. The court adjudge and decree that defendants and co-conspirators have engaged in an unlawful combination and conspiracy in restraint of trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1), California Business and Professions Code section 16700 et seq., California Insurance Code section 790 et seq., and California Business and Professions Code section 17200 et seq.

158. Defendants, their officers, directors, employees, agents, successors, assigns, subsidiaries, members, and all other persons acting or claiming to act on their behalf, be enjoined from, in any manner, directly or indirectly, continuing, maintaining, or renewing the combinations

and conspiracies hereinbefore alleged, and from engaging in any other combination, conspiracy, contract, agreement, understanding, or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

159. Defendant ISO and its member companies and their staffs be enjoined from communicating directly outside the formal auspices of ISO, or other authorized rating bureau under applicable state law, concerning (a) rates, (b) standard policy form language, (c) choice of policy forms, or (d) terms and conditions of insurance, for any line, class or risk.

160. Defendant ISO and its directors, officers, employees, agents, and any other persons purporting to act on its behalf be enjoined from holding any meeting at the same time and location, or in coordination with, the meeting of any other trade association or group in the insurance industry.

161. Defendant ISO be enjoined to maintain accurate records of all attendees at every meeting of its Board, Executive Committee, or other committee or subcommittee meetings convened under the auspices of ISO, and to tape record each such meeting, including meetings held by conference call, and to maintain such tape(s) for a period of at least five years after the date(s) of such meetings, and make such tapes available, upon written request, to the Antitrust Section of the Attorney General of plaintiff State of California.

162. Defendant ISO be enjoined to maintain true and correct copies of all speeches, press releases, official publications, and other public statements by an officer, director, employee, agent, or other person acting on behalf of ISO, or acting in a capacity reasonably likely to be taken to be on behalf of ISO.

163. Defendant ISO be enjoined to issue forms or form coverage parts which include all of the elements of the original March 1984 CGL forms, as thereafter lawfully amended to include the following terms:

a. an automatic 60 day "mini-tail" for reporting claims:

b. Limitations upon an insurer's total freedom to advance the policy's retroactive date;

c. an automatic five year tail for occurrences notified to insurer but not yet claimed;

d. an advisory endorsement to reinstate a policy's aggregate limits if any unlimited reporting "tail" is separately purchased;

e. a requirement that the insurer notify the insured of his right to purchase an unlimited reporting "tail" whenever the retroactive date of the policy is advanced;

f. Limitations on the amount of detail required in the notice from the insured to the insurer which is required to activate the automatic 5-year "tail".

164. Enjoin defendant ISO to maintain statistical and rating support for the 1973 CGL form and for the 1984 CGL form as provided in the preceding paragraph.

165. Enjoin defendant ISO to provide any and all data maintained by ISO or received by ISO to any person, firm, public agency, or other entity requesting such data, conditioned only on payment of a reasonable, cost-based fee.

166. Enjoin each and every defendant insurer and reinsurer specified in paragraphs 1-110 from participating on any board or committee of ISO for five years.

167. Enjoin each and every defendant insurer and reinsurer specified in paragraphs 1-110 from making any

public announcements urging, recommending, or announcing product restrictions, pricing behavior, or changes in loss reserves.

168. Enjoin defendant ISO to maintain on its Board of Directors public-interest members as appointed by the Court, which public-interest members shall constitute a majority of the Board of Directors, and who shall be provided adequate compensation and support to participate effectively in the business of the Board of Directors.

169. Order that defendant ISO be restructured in such manner as the Court determines is necessary to prevent further anticompetitive conduct.

170. Enjoin each defendant reinsurer and each member company of the defendant RAA from communicating directly or indirectly with any other reinsurer, save in a public announcement made in the legitimate press media, that it is considering withdrawing or forebearing from reinsuring any primary insurer, or any line of insurance.

171. Enjoin each defendant reinsurer, defendant RAA, and its member companies from establishing any formal or informal committees or other groups of competing reinsurers, or from communicating among themselves, for purposes that include or contemplate any activity regarding any forms, coverage parts, rates, terms or conditions upon which primary insurers or reinsurers provide coverage for CGL risks.

172. Enjoin each and every defendant reinsurer specified in paragraphs 1-110, and all members of the RAA, from communicating directly or indirectly outside a formal meeting of the RAA, or other legitimate trade organization, concerning rates, pricing, forms or other terms of insurance or reinsurance.

173. Enjoin defendant RAA to maintain accurate records of all attendees at every meeting of every Board, Executive Committee, or other committee or subcommittee

convened under the auspices of RAA and to tape record each such meeting, including meetings held by conference call, and maintain all such tape(s) for a period of not less than five years after the date(s) of such meetings, and make such tapes available, upon written request, to the Antitrust Division of the Attorney General of plaintiff State of California.

174. Enjoin each defendant Lloyd's of London Underwriter and London Company Market Underwriter and each member of the RAA to withdraw, in writing, any requirement it has imposed on any primary insurer that it exclusively implement claims-made forms for any of its CGL lines of business or which declare or create a boycott of any line or class of insurance, or any coverage part, and to submit copies of all such withdrawals to the court and the Attorney General of the plaintiff State of California.

175. Enjoin defendant General Re from participating in any Board or committee of the RAA for five years.

176. Enjoin defendants Thomas A. Greene and Co., R.K. Carvill Co., Ltd. and Ballantyne, McKean and Sullivan Ltd., from providing information to any reinsurer on the prices, terms, or conditions being imposed by any other reinsurer except as may be necessary in the course of negotiating a specific reinsurance contract on behalf of a specific, bona fide purchaser of reinsurance.

177. Enjoin each and every defendant engaged in the sale of insurance to consumers to divest itself of any and all reinsurance and brokerage affiliates, subsidiaries, or other operations, and enjoin said defendant from engaging in such operations in the future without leave of court.

178. Enjoin each and every defendant operating as an admitted carrier in plaintiff State of California to divest itself of any and all surplus lines and nonadmitted affiliates, subsidiaries, or other operations, and enjoin said

defendant from engaging in such operations in the future without leave of court.

179. Enjoin each and every defendant operating as a reinsurer to divest itself of any and all intermediary brokerage affiliates, subsidiaries, or other operations and enjoin said defendant from engaging in such operations in the future without leave of court.

180. Enjoin each and every defendant insurer and reinsurer from conditioning insurance or reinsurance on the insured's support for any action by any governmental entity or trade association.

181. Enjoin all defendants to develop individual antitrust compliance programs, and manuals detailing same, to be approved by the court and to report on an annual basis for 10 years to the court and plaintiff's counsel with regard to compliance efforts pursuant thereto.

182. Enjoin each and every defendant to establish and maintain a fund for the benefit of plaintiffs who have incurred injury for claims for which said plaintiffs would have had CGL coverage but for defendants' violations of law.

183. Plaintiffs be awarded three times the damages incurred by them as a consequence of the aforesaid conspiracies and combinations, as determined by the Court.

184. That each defendant be ordered to pay plaintiff civil penalties in an amount to be determined by the court, in accordance with California Business and Professions Code section 17206.

185. Plaintiffs have such other and further relief as the nature of the case may require and the court may deem just and proper.

186. Plaintiffs recover the costs of, and attorneys fees associated with, presenting this action.

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b), Federal Rules of Civil Procedure, and Rule 200-4, Local Rules, United States District Court, Northern District of California, Plaintiffs demand trial by jury for all of the issues pled herein so triable.

DATED: March 22, 1988

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BY: /s/ Thomas P. Dove
THOMAS P. DOVE
Deputy Attorney General

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C88 2332

ANTITRUST JURY DEMAND

THE STATE OF CONNECTICUT, on behalf of itself and all municipalities, school districts, and other political subdivisions within the State, PLAINTIFF

v.

HARTFORD FIRE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, AETNA CASUALTY AND SURETY COMPANY, CIGNA CORPORATION, INSURANCE SERVICES OFFICE, INC., PETER N. MILLER, ROBIN A.G. JACKSON, MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, THREE QUAYS UNDERWRITING MANAGEMENT LIMITED, JANSON GREENE MANAGEMENT LIMITED, EDWARDS & PAYNE (Underwriting Agencies) LIMITED, C.J.W. (Underwriting Agencies) LIMITED, MURRAY LAWRENCE & PARTNERS, OXFORD SYNDICATE MANAGEMENT LIMITED, D.P. MANN UNDERWRITING AGENCY LIMITED, UNIONAMERICA INSURANCE CO., LTD., CNA RE (U.K.) LTD., TERRA NOVA INSURANCE CO., LTD., EXCESS INSURANCE COMPANY LIMITED, KEMPER RE (U.K.) LTD., CONTINENTAL REINSURANCE CO. (U.K.) LTD., THOMAS A. GREENE & CO., INC., BALLANTYNE, MCKEAN & SULLIVAN, LTD., R.K. CARVILL & CO., LTD., REINSURANCE ASSOCIATION OF AMERICA, GENERAL REINSURANCE CORPORATION, CONSTITUTION REINSURANCE CORPORATION, MERCANTILE & GENERAL REINSURANCE COMPANY OF AMERICA, PRUDENTIAL REINSURANCE COMPANY, NORTH AMERICAN REINSURANCE CORPORATION, WINTERTHUR SWISS INSURANCE COMPANY, DEFENDANTS

COMPLAINT

[Filed June 14, 1988]

PRELIMINARY STATEMENT

The State of Connecticut, by its Attorney General, Joseph I. Lieberman, brings this action on its own behalf, as *parens patriae* on behalf of the general welfare and economy of the state, and on behalf of all municipalities, school districts and other political subdivisions which have been injured by defendants' violations of federal and state antitrust laws.

Defendants include major insurance and reinsurance firms and their trade associations. The defendants' illegal collusion resulted in severe restrictions in the availability and affordability of CGL property/casualty insurance coverage for governmental entities and businesses.

The first claim for relief concerns all of the activities of the defendants herein. The remaining claims for relief, alternatively concern specific activities of particular defendants as hereinafter described. The second claim for relief concerns the manipulation of the standard policy forms relating to Commercial General Liability ("CGL") insurance coverage. These forms, produced by defendant Insurance Services Office, Inc. ("ISO"), dominate the markets for CGL, which is the general liability insurance purchased by most insurance consumers. Anti-consumer revisions were made in ISO's CGL forms as the result of boycotts, threats, intimidation and other coercive conduct by defendants. For example, insurance coverage for pollution was completely excluded from ISO's CGL policy forms. Additionally, insurance coverage for prior events was eliminated in ISO's new CGL "claims-made" insurance form. Defendants' conspiratorial and coercive conduct caused a severe market-wide constriction of CGL insurance coverage.

The third claim for relief alleges that defendant reinsurance companies and others conspired to boycott the "occurrence form" of ISO's CGL policy. Defendants allegedly did so in order to coerce insurers into offering the "claims made" form which provides consumers of insurance services far less actual insurance coverage. The fourth and fifth claims allege that domestic and foreign reinsurers boycotted and withheld reinsurance from the coverage of pollution risks. The sixth claim concerns the conspiracy between ISO and other defendants to standardize both "umbrella" and "excess" insurance forms. The seventh claim alleges corresponding violations of Connecticut state antitrust law as a result of all of the foregoing acts.

Plaintiff seeks declaratory relief, injunctive relief, civil penalties, and three times the damages sustained as a result of defendants' conspiracies in unreasonable restraint of trade.

I.

JURISDICTION AND VENUE

1. This complaint is filed and the jurisdiction of the court is invoked under the provisions of 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. §§ 15 and 26. Plaintiff seeks monetary, declaratory and injunctive relief for injuries caused by defendants' violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Claims arising under the Connecticut Anti-Trust Act, Conn. Gen. Stat. §§ 35-24, *et seq.* are also stated herein. This Court has pendent jurisdiction over such claims.

3. Venue is proper in this District under Sections 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15 and 22, and 28 U.S.C. § 1391. Each of the defendants transacts business, has agents, resides or is found within the Northern District of California. Certain of the defendants are aliens, as alleged below.

II.

DEFINITIONS

4. As used in the complaint, the following terms are defined as:

(a) "Claims-made form" means a CGL form under which the insurer is liable only for claims made during the policy period. It does not cover any claim that is received after the expiration date of the policy, even if the accident or event giving rise to the claim occurred during the effective dates of the policy. Prior to 1984, the claims-made form was not ordinarily used for CGL insurance.

(b) "Commercial general liability (CGL) insurance" means insurance coverage for third party damage (*i.e.*, "casualty") claims against a purchaser of insurance (the "insured"). Purchasers of CGL insurance include governmental entities, not-for-profit corporations and businesses. CGL insurance does not include coverage for damage to the property of an insured.

(c) "Defense within limits" (also referred to as "defense cost containment"; "defense cost within policy limits"; "defense cost cap") means a CGL policy provision which includes the insurer's defense costs as part of the stated policy limits. CGL insurance policies historically have included an obligation on the part of the insurer to pay the full legal costs of defending a claim without regard to policy limits.

(d) "Dual form availability" mean the availability of two standard CGL forms: an occurrence form and a claims-made form.

(e) "Insurance Services Office, Inc. (ISO)," is a not-for-profit corporation with offices throughout the country, including one in San Francisco, California. ISO is headquartered in New York, New York. It is a trade association for approximately 1,400 primary property casualty

insurance companies operating in the United States, including defendants Hartford, Allstate, Aetna and CIGNA. One of ISO's functions is to develop standard policy forms for use by insurance companies.

(f) "Layer" or "layer of coverage" means a portion of risk assumed by either a primary insurer or a reinsurer. Risks are layered to the extent that an insurer or reinsurer may be responsible only for claims above a certain amount but below another amount. For example, a reinsurer may agree to indemnify a primary insurer for claims paid by the latter in excess of $1 million but less that $2 million. The primary insurer may "retain" the first million dollars in exposure, while other reinsurers may cover higher risk exposure layers, such as those above the $2 million level.

(g) A "lead underwriter" is an underwriter recognized as having special expertise in certain classes and lines of risks. Ordinarily, he negotiates (with a primary insurer's broker, or intermediary) the terms, conditions and price of a reinsurance treaty which his syndicate or company will cover. The lead underwriter then is the first to sign the treaty. Thereafter, a broker arranges for other ("following") syndicates or companies to join the treaty on the same terms and conditions as those negotiated by the lead underwriter. Accordingly, lead underwriters have an influence on the reinsurance market far beyond the percentage of the risks that they actually assume.

(h) "Lloyd's of London" (Lloyd's) is an insurance marketplace or exchange in London, England, where syndicates transact their business. Lloyd's syndicates compete for business both within the Lloyd's marketplace and in the world-wide insurance and reinsurance markets. A Lloyd's policy may be underwritten by dozens of individual syndicates, each sharing a portion of the risk. The Lloyd's market provides reinsurance, as well as direct coverage in certain other unregulated markets, in the

United States. Approximately half of Lloyd's casualty business involves North American risks. At Lloyd's, all reinsurance must be procured through a broker admitted to the floor at the Lloyd's market.

(i) "London Company Market" means a group of insurance firms which are located in London but are not a part of the Lloyd's marketplace. These firms provide insurance and reinsurance coverage often by following the lead of a Lloyd's syndicate.

(j) "1984 ISO CGL forms" means the two CGL forms (an occurrence form and a claims-made form) filed by ISO with state regulators beginning in March 1984.

(k) "1986 ISO CGL forms" means the two CGL forms filed by ISO with state regulators for use in 1986, which forms contained a complete pollution exclusion, and as to the claims-made form included a retroactive date.

(l) "1973 ISO CGL form" means the standard CGL occurrence form and coverage parts developed by ISO in 1973, as amended prior to 1984.

(m) "Occurrence form" means a liability insurance form that covers injuries or losses, whenever claimed, that occur during the policy period. The policy in force when the injury or loss occurs pays the claim, even if the claim is made after the policy has expired. Prior to 1984, occurrence coverage was the principal form used for CGL insurance.

(n) "Pollution exclusion" refers to the exclusion from the 1986 ISO CGL forms of all coverage for pollution claims, including claims alleging damage caused by "sudden and accidental" pollution. The 1986 ISO CGL forms eliminated all pollution coverage.

(o) "Primary insurer" means an insurance company that sells insurance directly to consumers, including governments and businesses.

(p) "Reinsurance" means insurance for insurers. Reinsurance is a transaction whereby one insurance company, the reinsurer, agrees to indemnify another insurance company, the primary (or "ceding") insurer, for a designated portion of the insurance risks underwritten by the primary insurer. Reinsurance protects the primary insurer from catastrophic losses, and is heavily relied upon by prudent primary insurers. It also allows the primary insurer to sell more insurance than its own financial capacity might otherwise permit. Thus, the availability of reinsurance affects the ability and willingness of primary insurers to provide insurance to their customers.

(q) "Retroactive date" (retro date) means a provision in a claims-made insurance contract which excludes coverage for accidents or events that occurred prior to the specified date.

(r) "Retrocessional reinsurance" means insurance for reinsurers.

(s) "Risk" means the hazard or type of potential accident for which the insured seeks insurance protection. The term is also used within the industry to describe the insured itself, such as a "commercial risk" or a "municipal risk."

(t) "Sunset clause" means a provision included in a reinsurance treaty which limits the reinsurer's liability to those claims tendered to it by the primary insurer prior to the designated "sunset date." Thus a five year sunset clause means that the primary insurer will have no reinsurance coverage for claims it presents to the reinsurer later than five years from the inception of the treaty. Use of a sunset clause deprives primary insurers of reinsurance for long tail exposures beyond the sunset date.

(u) A "syndicate" is a group of individual investors associated with Lloyd's. Syndicates are separately owned and capitalized, independently operated, competing firms. Syndicates can act both as insurers and reinsurers. Each syndicate utilizes the services of an active underwriter to make its underwriting decisions and conduct all other insurance related business.

(v) "Tail" means the length of time during which an insurance company expects to receive claims arising from a certain risk covered by the insurance policy. Claims arising from "slips and falls" present the insurer with "short tail" exposure since all such claims will generally be known within a short time after their occurrence. Claims arising from environmental hazards such as asbestos pollution present insurers with "long tail" exposure because claims may be filed many years after the occurrence giving rise to such claim.

(w) "Treaty" means a contract by which a primary insurer transfers to one or more reinsurers a portion of a specified category of risks which the primary insurer will assume (*i.e.*, obligate itself to cover) during the term of the treaty.

(x) "Underwriting" means assessing and assuming a risk, and calculating a premium to be charged for assuming that risk.

III.

PLAINTIFF

5. Plaintiff, State of Connecticut, is one of the sovereign states of the United States of America. By virtue of his authority as contained in Sections 35-32 and 35-44a of the Connecticut General Statutes, Joseph I. Lieberman, the Attorney General of the State of Connecticut, brings this action on behalf of the State of Connecticut and all of its municipalities, school districts and other political subdivisions for monetary and injunctive relief under the antitrust laws of the United States and the State of

Connecticut. The violations of federal and state law alleged herein have caused loss and damage, and threaten continued loss and damage, to the State, to the general welfare and economy of the State, and to the parties on whose behalf this action is brought.

IV.

DEFENDANTS

A. *Primary Insurers*

6. Hartford Fire Insurance Company ("Hartford") is a Connecticut corporation with its principal place of business in Hartford, Connecticut. It is licensed to sell, and did sell, CGL insurance in California and Connecticut. Hartford is made a defendant herein as to claims 1, 2, 6 and 7.

7. Allstate Insurance Company ("Allstate") is an Illinois corporation with its principal place of business in Northbrook, Illinois. It is licensed to sell, and did sell, CGL insurance in California and Connecticut. Allstate is made a defendant herein as to claims 1, 2, 6 and 7.

8. Aetna Casualty and Surety Company ("Aetna") is a Connecticut corporation with its principal place of business in Hartford, Connecticut. It is licensed to sell, and did sell, CGL insurance in California and Connecticut. Aetna is made a defendant herein as to claims 1, 2, 6 and 7.

9. CIGNA Corporation ("CIGNA") is a Delaware corporation with its principal place of business in Philadelphia, Pennsylvania. CIGNA, or its subsidiaries, are licensed to sell, and did sell, CGL insurance in California and Connecticut. CIGNA is made a defendant herein as to claims 1, 2, 6 and 7.

B. *Trade Associations*

10. Insurance Services Office, Inc. ("ISO") is a Delaware non-profit corporation with its principal place of business in New York, New York. ISO operates throughout the United States and has an office in San Francisco, California. It is an authorized insurance rating service organization in California and Connecticut. ISO is made a defendant herein as to claims 1, 2, 6 and 7.

11. Reinsurance Association of America ("RAA") is a trade association of domestic reinsurers with its principal place of business in Washington, D.C. RAA is comprised of reinsurers who transact business in California and Connecticut, and lobbies on their behalf in California. RAA is made a defendant herein as to claims 1, 2 and 7.

C. *Domestic Reinsurers*

12. General Reinsurance Corporation ("General Re") is a Delaware corporation with its principal place of business in Stamford, Connecticut. It provides reinsurance for insurers and risks located in California and Connecticut. General Re is made a defendant herein as to claims 1, 2 and 7.

13. Constitution Reinsurance Corporation ("Constitution Re") is part of a wholly-owned subsidiary of Xerox Financial Services, a Delaware corporation. Its principal place of business is in New York, New York and it provides reinsurance for insurers and risks located in California and Connecticut. Constitution Re is made a defendant herein as to claims 1, 2 and 7.

14. Mercantile and General Reinsurance Company of America ("Mercantile and General Re") is a New York corporation with its principal place of business in Morristown, New Jersey. It provides reinsurance for insurers and risks located in California and Connecticut. Mercantile and General Re is made a defendant herein as to claims 1, 2 and 7.

15. Prudential Reinsurance Company ("Prudential Re") is a Delaware corporation with its principal place of business in Newark, New Jersey. It provides reinsurance for insurers and risks located in California and Connecticut. Prudential Re is made a defendant herein as to claims 1, 2 and 7.

16. North American Reinsurance Corporation ("North American Re") is a New York corporation with its principal place of business in New York, New York. It provides reinsurance for insurers and risks located in California and Connecticut. North American Re is made a defendant herein as to claims 1, 2 and 7.

17. Winterthur Swiss Insurance Company ("Winterthur Swiss") is a Swiss limited liability company with its principal office in Winterthur, Switzerland. It provides insurance and reinsurance for insurers and risks located in California and Connecticut. Winterthur Swiss is made a defendant herein as to claims 1, 2 and 7.

D. *Lloyd's of London Syndicates*

18. Robin A.G. Jackson was, at all times relevant herein, the underwriter for defendant Merrett Syndicate. As the agent for Merrett Syndicate, Robin A.G. Jackson provided insurance and reinsurance for insurers and risks located in California and Connecticut. Robin A.G. Jackson is made a defendant herein as to claims 1, 2, 3 and 7.

19. Merrett Underwriting Agency Management Limited ("Merrett Syndicate"), is an unincorporated association of individuals with its principal place of business at Lloyd's. Merrett Syndicate provides insurance and reinsurance for insurers and risks located in California and Connecticut. Merrett Syndicate is made a defendant herein as to claims 1, 2, 3, 4, 5, 6 and 7.

20. Three Quays Underwriting Management Limited ("Three Quays"), is an unincorporated association of in-

dividuals with its principal place of business at Lloyd's. The chief underwriter for Three Quays is Richard Hazell. Three Quays provides insurance and reinsurance for insurers and risks located in California and Connecticut. Three Quays is made a defendant herein as to claims 1, 2, 3, 6 and 7.

21. Janson Greene Management Limited ("Janson Greene"), is an unincorporated association of individuals with its principal place of business at Lloyd's. Janson Greene provides insurance and reinsurance for insurers and risks located in California and Connecticut. Janson Greene is made a defendant herein as to claims 1, 2, 3 and 7.

22. Edwards & Payne (Underwriting Agencies) Limited ("Edwards & Payne"), is an unincorporated association of individuals with its principal place of business at Lloyd's. Edwards & Payne provides insurance and reinsurance for insurers and risks located in California and Connecticut. Edwards & Payne is made a defendant herein as to claims 1, 2, 3, 4, 5 and 7.

23. C.J.W. (Underwriting Agencies) Limited ("C.J.W.") is an unincorporated association of individuals with its principal place of business at Lloyd's. C.J.W. provides insurance and reinsurance for insurers and risks located in California and Connecticut. C.J.W., is made a defendant herein as to claims 1, 2, 4 and 7.

24. Murray Lawrence & Partners ("Murray Lawrence"), is an unincorporated association of individuals with its principal place of business at Lloyd's. Murray Lawrence provides insurance and reinsurance for insurers and risks located in California and Connecticut. Murray Lawrence is made a defendant herein as to claims 1, 4 and 7.

25. Oxford Syndicate Management Limited ("Oxford") is an unincorporated association of individuals with its principal place of business at Lloyd's. Oxford provides insurance and reinsurance for insurers and risks located in California and Connecticut. Oxford is made a defendant herein as to claims 1, 4, 5 and 7.

26. D.P. Mann Underwriting Agency Limited ("D.P. Mann"), is an unincorporated association of individuals with its principal place of business at Lloyd's. D.P. Mann provides insurance and reinsurance for insurers and risks located in California and Connecticut. D.P. Mann is made a defendant herein as to claims 1, 4 and 7.

27. Peter N. Miller was Chairman of Lloyd's during the period covered by this complaint. Miller is made a defendant herein as to claims 1, 3 and 7.

E. *London Company Market Reinsurers*

28. Unionamerica Insurance Co., Ltd. ("Unionamerica"), is a limited liability company with its principal place of business in London. Unionamerica provides insurance and reinsurance for insurers and risks located in California and Connecticut. Unionamerica is made a defendant herein as to claims 1, 4, 5 and 7.

29. CNA Re (U.K.), Ltd. ("CNA Re"), is a limited liability company with its principal place of business in London. CNA Re provides insurance and reinsurance for insurers and risks located in California and Connecticut. CNA Re is made a defendant herein as to claims 1, 4 and 7.

30. Terra Nova Insurance Co., Ltd. ("Terra Nova"), is a limited liability company with its principal place of business in London. Terra Nova provides insurance and reinsurance for insurers and risks located in California and Connecticut. Terra Nova is made a defendant herein as to claims 1, 4, 5 and 7.

31. Excess Insurance Company Limited ("Excess"), is a limited liability company with its principal place of business in London. Excess provides insurance and re-

insurance for insurers and risks located in California and Connecticut. Excess is made a defendant herein as to claims 1, 5 and 7.

32. Kemper Re (U.K.) Ltd. ("Kemper Re"), is a limited liability company with its principal place of business in London. Kemper Re provides insurance and reinsurance for insurers and risks located in California and Connecticut. Kemper Re is made a defendant herein as to claims 1, 5 and 7.

33. Continental Reinsurance Co. (U.K.), Ltd. ("Continental Re"), is a limited liability company with its principal place of business in London. Continental Re provides reinsurance for insurers and risks located in California and Connecticut. Continental Re is made a defendant herein as to claims 1, 5 and 7.

F. *Brokers*

34. Thomas A. Greene & Co., Inc. ("Thomas A. Greene"), is a New York corporation with its principal place of business in New York, New York, and offices in San Francisco, California. It acts as an intermediary broker for primary insurance companies doing business in California and Connecticut. Thomas A. Greene is made a defendant herein as to claims 1, 2 and 7.

35. Ballantyne, McKean & Sullivan, Ltd. ("Ballantyne McKean"), is a limited liability company with its principal place of business in London. It is an authorized Lloyd's broker which places insurance for insureds and reinsurance for primary insurance companies for risks located in California and Connecticut. Ballantyne McKean is made a defendant herein as to claims 1, 3, 4 and 7.

36. R.K. Carvill & Co. ("R.K. Carvill"), is a limited liability company with its principal place of business in London. It is an authorized Lloyd's broker which places reinsurance for primary insurance companies doing business in California and Connecticut. R.K. Carvill is made a defendant herein as to claims 1, 2 and 7.

V.

CO-CONSPIRATORS

37. Various persons, firms, corporations or other business entities, known and unknown to plaintiffs, are not made defendants herein but participated as co-conspirators with defendants in the violations alleged herein and performed acts and made statements in the furtherance thereof.

VI.

TRADE AND COMMERCE AFFECTED

38. The activities of the defendants and their co-conspirators, and the restraints which are the subject of this complaint, were and are within the flow of, and substantially affect, interstate commerce, as more particularly described below.

39. During the period covered by this complaint the defendant primary insurance companies sold CGL insurance throughout Connecticut and the United States. Their customers included, among others, corporations engaged in interstate commerce as well as state and local governmental entities. In 1986, CGL insurance premiums in the United States were $24.1 billion. Defendants Hartford, Allstate, Aetna, and CIGNA are providers of CGL insurance in Connecticut and throughout the United States.

40. Defendant reinsurance companies and syndicates provide reinsurance for CGL insurance and property insurance policies throughout Connecticut and the United States. Approximately one-half of Lloyd's business covers North American risks. Income from United States CGL reinsurance and property reinsurance premiums constitutes a substantial portion of all reinsurance premium income in both the United States and London.

41. During the period covered by this Complaint, the sale of CGL property/casualty insurance and reinsurance involved the following, among other things:

(a) Various channels of interstate communication, including telephone lines and the mails, were regularly used in the purchases of CGL property/casualty insurance and reinsurance and in the development of the ISO CGL insurance forms described in this complaint;

(b) A substantial amount of the CGL insurance that was purchased by plaintiff, and the parties upon whose behalf this action is brought, came from outside Connecticut;

(c) Insurance forms for the sale of CGL insurance were developed by defendant ISO and other defendants, which forms were filed or lodged with the insurance regulators of each State of the United States, including the State of Connecticut;

(d) A substantial quantity of CGL insurance was sold nationwide on forms developed by defendant ISO; and

(e) Each defendant insurance company purchases a substantial quantity of reinsurance from outside the State in which it is located.

42. The illegal conduct challenged herein has had, and may be expected to continue to have, a not insubstantial effect on the above-described interstate trade and commerce.

VII.

BACKGROUND: STATE REGULATION AND ISO

A. *State Regulation of Insurance*

43. All fifty states regulate some aspects of the business of insurance. The extent of the regulation varies widely from state to state and depends on the type of insurance.

44. Pursuant to state law, only "admitted," or licensed, insurers such as defendants Hartford, CIGNA, Aetna and Allstate are permitted to write CGL insurance, with one exception. That exception is for "surplus" or "excess" lines. Surplus or excess lines are unusual lines of insurance for which coverage is nominally unavailable in the admitted market. For those lines, after the unavailability has been certified, the policy may be written by a non-admitted company known as a surplus or excess lines insurer. These surplus or excess lines are not regulated by the states.

45. Umbrella and excess coverage provides insurance consumers with higher levels of protection above other liability insurance they may purchase. Umbrella and excess insurance can be written by either admitted or non-admitted insurance companies. States also do not regulate umbrella and excess coverage offered by non-admitted insurance companies.

46. Reinsurance transactions are not subject to state insurance regulation.

B. *ISO and the Market Dominance of ISO Forms*

47. The Insurance Services Office ("ISO") is a trade association consisting of approximately 1400 property/casualty insurers including defendants Hartford, Allstate, CIGNA, and Aetna. ISO was created in 1971 as a result of the merger of eleven regional and national property and casualty rating bureaus. The member companies of ISO write approximately 95% of all casualty insurance written in the United States. These defendants have at all relevant times authorized ISO to file CGL policy forms with the Connecticut Insurance Commissioner.

48. ISO performs a variety of tasks for its member companies. Among other functions, it develops standard policy forms, collects historical loss and other data, projects future loss trends based on that data, and calculates

advisory premium rates and rules for CGL and certain other lines of insurance.

49. ISO is headed by a Board of Directors and an Executive Committee which reports to the Board. Policy forms are developed by insurance company representatives sitting on standing committees such as the "Commercial Lines Committee." Defendants Hartford, Allstate, CIGNA and Aetna all played leadership roles in the development of ISO CGL forms.

50. CGL insurance written by primary insurers in the United States, including that written by defendants Hartford, Allstate, CIGNA and Aetna is predominately written on the ISO standard policy forms and coverage parts.

51. The dominance of the ISO CGL forms results from the monopoly position it has occupied since the 1971 merger referred to above. One of ISO's key functions is its actuarial operations of maintaining a national statistical data base which records the actual performance ("loss history") of its policy forms in the marketplace.

52. For example, with respect to the 1973 ISO CGL form, ISO collected, aggregated and interpreted data on the premiums charged, claims filed and paid, defense costs expended and many other categories of information which show precisely how this insurance product performed.

53. Applicable law in Connecticut, and other states, permits ISO to act as a rating organization for its member companies. ISO projects future loss trends based on the data it has collected, and then calculates advisory rates for CGL and other lines of insurance.

54. Non-admitted companies in the surplus lines market often use ISO CGL forms, or parts thereof, to underwrite risks, including those of the plaintiff and the parties on whose behalf this action was brought.

VIII.

FACTS

A. *The 1973 ISO Occurrence Form*

55. The conspiracies alleged herein occurred after ISO undertook to revise its standard CGL insurance form that had been in use since 1973.

56. The 1973 ISO form employed the traditional "occurrence" trigger of coverage that had long been used for CGL insurance. The standard occurrence policy language obligated the insurance company to pay or defend claims, whenever made, resulting from an accident or "injurious exposure to conditions" that occurred during the period the policy was in effect.

57. The 1973 ISO form covered claims relating to "sudden and accidental" pollution.

58. Another key provision of the 1973 ISO CGL form was that legal costs of defending claims were borne by the insurance company rather than the insured. A 1973 CGL policy for $1,000,000 worth of insurance coverage would provide fully that much protection for the insured, and would not be reduced by the cost of defending against the claim.

59. In 1977 ISO began a project to substantially revise the 1973 occurrence form. This process resulted in a new set of CGL forms filed or lodged with state insurance regulators in March 1984.

B. *The 1984 ISO Forms*

60. The 1984 ISO CGL forms differed from the 1973 ISO CGL form in one key respect relevant to this complaint: for the first time ISO filed two alternative CGL forms, one with a traditional "occurrence" trigger of coverage and a second with a new "claims-made" trigger.

61. The "claims-made" concept was a major change in the way CGL insurance had always been written. The trigger of coverage for the occurrence form focused on

when the accident or event itself occurred and it did not matter when the notice of the claim actually reached the insurance company. The trigger of coverage for the "claims-made" policy, on the other hand, was the receipt of the claim by the insurer. If the claim came in during the period the policy was in effect, it was covered. If the claim was filed after the policy had expired, it was not covered. Coverage for these future claims is entirely dependent upon the insured's ability to purchase claims-made CGL insurance in succeeding years.

62. The claims-made form provides much less protection against long tail losses than an "occurrence" form. It shifts the risk of uncertainty for claims filed in the future from the insurer to the insured. Claims-made policies can be used by insurers to cut off liability to claims reported in the future by refusing insurance renewals to insured who experience any increased or unexpected trend in claims.

63. As originally filed by ISO, the 1984 claims-made CGL form did not include a "retroactive date" provision. Inclusion of a "retroactive date" provision has the effect of cutting off all coverage for occurrences prior to the retroactive date. Without a retroactive date an injury in 1983 that was not filed with the insurance company until 1984 would be covered by the 1984 claims-made policy.

64. Other key aspects of the two 1984 ISO forms, however, were identical to the 1973 CGL form. Most important, both new forms continued to cover damage caused by "sudden and accidental" pollution. In addition, legal defense costs would continue to be borne by the insurance company without regard to the policy limit.

65. Within ISO, defendant Hartford opposed the proposed CGL forms on the grounds that: (a) the occurrence form should have been eliminated entirely in favor of issuing solely a claims-made form; (b) the claims-made form should have included a standard retroactive

date provision; (c) pollution coverage should have been totally excluded by elimination of the coverage for "sudden and accidental" pollution coverage; and (d) defense costs payable under the policy by the insurer should have been limited by including defense costs within the policy limits. Defendant Allstate opposed the claims-made form because it contained no standard retroactive date provision.

66. The majority of ISO Executive and Commercial Lines Committee members, however, supported the proposed CGL forms and rejected the changes proposed by defendants Hartford and Allstate. On December 15, 1983 the new CGL forms were approved by the ISO Board of Directors. ISO filed or lodged the two new CGL forms with state regulators beginning in March 1984.

C. *RAA's Response to the 1984 Forms*

67. After their positions were rejected by a majority of ISO, certain primary insurance companies, including defendants Hartford, CIGNA, Aetna and Allstate, exerted concerted pressure on ISO staff and other ISO Company members in an effort designed to have the CGL forms withdrawn and to restrict CGL coverage available to the consumer under any new CGL forms.

68. On March 2, 1984 representatives of Hartford met with representatives of General Re, the largest American reinsurer. The purpose of the meeting was to formulate a joint strategy to force changes in the 1984 ISO CGL forms. At this meeting, Hartford and General Re agreed to either coerce ISO to adopt their demands or, failing that, to "derail" the entire ISO CGL forms program.

69. At an RAA Executive Committee meeting held March 13, 1984, in furtherance of its agreement with Hartford, General Re initiated a coordinated effort with the RAA to force revisions in the ISO CLG forms program. On April 18, 1984, RAA and certain of its mem-

bers were informed by ISO staff that changes in the 1984 ISO CGL form would not be made. In response, on May 26, 1984 the RAA Executive Committee created a "CGL Committee" consisting of defendants General Re, Mercantile & General Re, Constitution Re, North American Re and Winterthur Swiss.

70. At a June 15, 1984 meeting of the RAA CGL Committee, its members agreed to boycott the 1984 ISO CGL forms unless a retroactive date was added to the claims-made form, and a pollution exclusion and a defense cost cap were added to both forms.

71. In a letter to ISO dated June 19, 1984, RAA announced that its members would not provide reinsurance for coverages written on the 1984 ISO CGL forms. Before it was sent, each of the members of the RAA CGL Committee approved the wording of the letter. Prudential Re approved the substance of the letter.

72. Defendants General Re and Hartford also enlisted Thomas A. Greene, President of defendant Thomas A. Greene & Co., Inc., to convey the boycott message to ISO in a widely-reported speech to the ISO Board of Directors on June 21, 1984. Greene stated that no reinsurers would "break ranks" to reinsure the 1984 ISO CGL forms.

D. *Lloyd's Response*

73. Defendants Hartford, Allstate, CIGNA and Aetna also encouraged a boycott of the 1984 ISO CGL forms by key Lloyd's syndicates, including the lead underwriters for North American casualty reinsurance. As with the RAA conspiracy, the common goal of the London reinsurers, as well as the primary insurer defendants, was to coerce ISO and its members to withdraw the 1984 ISO CGL forms and issue a more restrictive CGL form. These anti-consumer restrictions would include an end to all coverage for pollution liability and the addition of a retroactive date on a new claims-made form.

74. Defendants Hartford, Allstate, CIGNA, Aetna and others communicated to several lead Lloyd's syndicates, including defendants Merrett Syndicate, Edwards & Payne, and Three Quays, their desire to restrict the ISO CGL coverage.

75. As early as April 23, 1984 ISO learned that defendant Robin Jackson of Merrett Syndicate, a highly influential lead underwriter in the North American casualty reinsurance market, was threatening to withhold reinsurance from the market for primary companies using the new ISO forms.

76. In late May 1984, ISO, in recognition of Lloyd's power as a reinsurer of the United States CGL market, arranged a visit to London for July, 1984 to explain and promote the 1984 ISO CGL forms to the London market.

77. Prior to the July London meetings, Hartford and Allstate enlisted the aid of intermediary brokers Thomas A. Greene, and Nick Graham of R.K. Carvill to maximize the London reinsurance market's pressure on ISO to change its CGL forms.

78. While ISO staff were in London to discuss the March 1984 ISO CGL forms, London reinsurers threatened a boycott of North American CGL risks unless four key demands were met:

(a) The elimination of any ISO CGL occurrence form;

(b) The addition of a retroactive date to a new revised CGL claims-made form;

(c) The exclusion of any pollution liability coverage from any CGL form; and

(d) Defense costs within limits.

79. These demands were conveyed to ISO staff in meetings with individual syndicates and companies in the London market, and at a dinner at the Garrick Club hosted by ISO on July 4, 1984. In attendance at the

dinner were the leading Lloyd's underwriters of U.S. casualty reinsurance, including Robin A.G. Jackson of the Merrett Syndicate, Richard Hazell of Three Quays, Charles Skey of Edwards & Payne, and Gale Coles of Janson Greene. ISO staff reported that the dinner attendees were "almost militant" in their resolve to eliminate coverage of CGL risks on the occurrence form.

80. After returning from London, ISO staff met with defendant Hartford at its headquarters in Connecticut. By this time threat of a reinsurance boycott unless key changes were made in the 1984 ISO CGL forms was known within ISO as "the Hartford problem." Defendant Hartford continued to insist upon the coverage restrictions previously described.

81. Sometime between August 12 and August 22, 1984, ISO staff, in a reversal of its own previous position on these matters, agreed to recommend that key provisions of the 1984 CGL forms be reconsidered and revised as demanded. On August 23, 1984, under pressure from defendants, the Commercial Lines Committee of ISO capitulated and reversed its positions on the retroactive date and pollution exclusion. Later that same day, the ISO Executive Committee decided that a final decision on these revisions to the forms should await their next meeting on September 20, 1984.

E. *The September 20, 1984 Agreement*

82. As demanded on August 23, 1984 by defendants Hartford and Aetna, ISO invited representatives of both the foreign and domestic casualty reinsurance markets to the September 20, 1984 Executive Committee meeting. Never before had representatives of the domestic or foreign reinsurance markets been invited to speak at an ISO Executive Committee meeting.

83. Eight representatives of what were major sources of reinsurance for all of ISO's member companies were

invited to attend both the September 20 meeting and a dinner with the Committee to be hosted by ISO the evening before. These representatives were:

(a) Ronald Ferguson and John Etling, Chairman and President, respectively, of General Re;

(b) N. David Thompson, President of North American Re;

(c) George Nimmo, President of Prudential Re and the Chairman of the RAA at the time;

(d) Andre Maisonpierre, President of RAA;

(e) Robin Jackson of the Merrett Syndicate;

(f) Richard Hazell of Three Quays; and

(g) Gale Coles of Janson Greene. ISO staff also contacted six other Lloyd's reinsurers and encouraged them to convey their views on the scheduled issues to Jackson, Hazell and Coles.

84. During the evening of September 19, 1984 Ferguson and Etling of General Re, Thompson of North American Re, Nimmo of Prudential Re and Chairman of the RAA, Maisonpierre, the RAA president, and ISO officers dined at the Board Room, a private club in New York City. At this dinner the reinsurers communicated to ISO Board Members present their agreed positions on the CGL revision issues set for an ISO Executive Committee vote the next day.

85. Of the eight reinsurer representatives invited by ISO, only Hazell and Coles could not attend the September 20 meeting. With advance knowledge of this fact in mind, ISO had urged Hazell and Coles to convey their views to Jackson before the meeting. Jackson conferred with at least Hazell and Coles before attending the meeting at ISO's headquarters in New York.

86. At the ISO Executive Committee meeting of September 20, 1984 the foreign and domestic reinsurer repre-

sentatives presented their agreed upon positions that there would be changes in the CGL forms or no reinsurance.

87. As of September 20, 1984 ISO members were already aware of emerging capacity problems in the CGL reinsurance markets and the difficulties they would face in the renewal of their casualty treaties for 1985. A reinsurance boycott at that time would have been devastating for ISO members.

88. After the reinsurance representatives spoke, the ISO Executive Committee voted to include a retroactive date in the claims-made form, to exclude all pollution coverage from both new forms, and to defer to a later date the revision of the forms on the defense cost containment issue. ISO did not change its existing plan to offer a new occurrence form along with the new claims-made form. The 1984 ISO CGL forms were thereafter withdrawn from the marketplace and replaced with new substitute CGL forms which include the coverage restrictions insisted upon by the defendant reinsurers and insurance companies. The final version of the revised forms were filed or lodged with state regulators in 1986.

89. In furtherance of the agreements reached on September 20, 1984, defendants ISO, Hartford, Aetna, and a "London reinsurer" combined to form an "ISO Team" to market the new forms. This scheme included coordinated speeches before groups of insurance brokers and agents to convince them that a reinsurance boycott, and thus loss of income to the agents and brokers who would be unable to find available markets for their customers, would ensue if the ISO forms were not approved. The scheme also included plans to effect their agreement to add a defense within limits provision to the CGL forms.

F. *The Occurrence Form Boycott*

90. Even after their success at the ISO Executive Committee meeting on September 20, 1984, defendant Peter N. Miller, defendant Lloyd's reinsurers, including

Robin A.G. Jackson of the defendant Merrett Syndicate and Richard Hazell of defendant Three Quays, defendants Jason Green, Edwards & Payne, Ballantyne McKean and their co-conspirators, continued their attempt to eliminate the occurrence form as an option for most risks and to make the restrictive claims-made form the standard CGL policy form.

91. As a means of coercing the insurance market to accept the claims-made form, Lloyd's reinsurers employed two primary strategies:

(a) Public and private pronouncements that there would be no reinsurance for primary insurers writing on the occurrence form; and

(b) The redesign of reinsurance treaties to eliminate coverage for "long tail" risks, thereby leaving the primary insurer without reinsurance protection for claims reported in the future. This exclusion became known as the "sunset clause".

92. In furtherance of the first strategy, Lloyd's reinsurers, including lead underwriters Robin Jackson and Richard Hazell, collectively refused to write new treaties for, or to renew long-standing treaties with, primary U.S. insurers unless they were prepared to switch from the occurrence to the claims-made form. Primary insurers who did not evidence a strong intention to commit to claims-made would be left either without reinsurance coverage or with very low limits of coverage, even though the claims-made form itself had not yet been approved for use in many jurisdictions.

93. Representatives of Lloyd's including defendant Peter N. Miller, then, and at all relevant times, the Chairman of Lloyd's, also appeared in various public forums and in the trade press to present their agreed upon position that Lloyd's was withdrawing entirely from the business of reinsuring primary U.S. insurers who wrote on the occurrence form. In furtherance of this

effort, Robin Jackson circulated a series of letters to brokers, clients and fellow reinsurance syndicates pressing for further changes in the ISO forms, including the elimination of the option of an occurrence form for any CGL risk.

94. A second stratagem employed by Lloyd's reinsurers, including defendants, was to impose a "sunset clause" restriction within their treaties with U.S. primary insurance companies that effectively eliminated reinsurance coverage for "long tail" risks written on the occurrence form.

95. After the so-called "sunset date", reinsurance coverage expires and the U.S. primary insurer becomes fully answerable for all losses without the benefit of reinsurance indemnity. The "sunset clause" was intended to force primary insurers to stop writing occurrence coverage, and to substitute claims-made coverage, for all risks except very small risks.

96. During 1985 and early 1986, London reinsurers, acting in conjunction with intermediary brokers, including defendant Ballantyne McKean, combined to impose sunset clauses in reinsurance treaties for U.S. primary casualty insurance written on an occurrence form basis.

G. *The Pollution Liability Coverage Boycott*

97. In addition to the boycott of the occurrence form in general, by no later than January 1, 1986, reinsurers in London also boycotted reinsurance for pollution liability coverage in particular, even if written on a claims-made form. This conspiracy had the effect of drastically restricting the availability and affordability of pollution liability coverage in the United States, including Connecticut.

98. The boycott was accomplished by joint agreement between lead Lloyd's of London underwriters and leading reinsurance firms in the London company market to ex-

clude all pollution liability coverage from "casualty" reinsurance treaties, beginning at least by late 1985 and continuing to the present. Participating Lloyd's syndicates included the defendants Merrett Syndicate, Three Quays, Edwards & Payne, C.J.W., Murray Lawrence, Oxford, and D.P. Mann. Participating London company market defendants included Unionamerica, CNA Re and Terra Nova.

99. On November 6, 1985, at a meeting of these lead underwriters at the offices of defendant Ballantyne McKean, those present agreed that all North American casualty reinsurance treaties, including coverage for CGL, would be written with a total pollution exclusion.

100. The complete exclusion of pollution coverage from casualty reinsurance treaties had a direct impact on U.S. primary insurers and insurance buyers. Insurance consumers that had potential pollution liability exposures, such as municipalities, could not find primary insurers willing to provide "sudden and accidental" coverage for such consumers.

H. *ISO's Withdrawal Of Support For The 1973 CGL Forms*

101. As a result of the boycott, coercion and intimidation described herein, ISO succeeded in obtaining regulatory approval in most states where such approval is needed for its revised CGL forms, both a new revised occurrence form and the revised claims-made form.

102. In Connecticut, the 1986 ISO CGL forms were originally filed with the Connecticut Insurance Commissioner on December 5, 1984, and affirmatively approved by said Commissioner for use in Connecticut in February, 1986.

103. On July 1, 1987, ISO officially withdrew its "support" of the 1973 CGL form. "Support" in this context

includes the normal data collection and actuarial services performed by ISO in aid of its member companies. Without such support, most ISO members could not continue to use the 1973 occurrence form, because it is very difficult and expensive for any single company to duplicate the critical ISO support functions.

104. Although many insurance consumers preferred the 1973 CGL forms, the market for this type of coverage has all but disappeared.

I. *ISO's Standardized CGL Insurance Policy For The Excess And Umbrella Markets*

105. Beginning no later than November 10, 1985, ISO staff and ISO members, including defendants Hartford and Aetna agreed that ISO staff should begin developing standardized CGL umbrella and excess policy language. CIGNA later joined this effort. This decision was made despite the fact that ISO, as the trade association for admitted property/casualty primary insurance companies, plays no authorized role in the unregulated excess and umbrella markets. "Excess" insurance is a specialized form of insurance normally not offered by admitted insurers on a regulated basis. "Excess" also refers to a layer of insurance, a higher level of indemnity protection, that sits on top of a self-insurance program, often referred to as a "retention", or a primary insurance policy. "Umbrella" coverage is similar to excess insurance and likewise is not normally offered on a regulated basis.

106. After the introduction of the new versions of the ISO CGL forms, ISO had begun to receive pressure from domestic reinsurers, London reinsurers, and others to develop standardized policy language for CGL excess and umbrella forms which would conform to the revised ISO CGL forms.

107. On January 14, 1986, the ISO Board of Directors approved a recommendation that the ISO staff develop

standardized excess and umbrella policy forms for broad distribution.

108. Early drafts of the standardized policy language were written by defendant Allstate, ISO staff members and others. Comments were solicited and received from defendants Merrett Syndicate, Three Quays and others in the reinsurance and umbrella and excess insurance markets.

109. On June 15, 1986 the ISO Executive Committee released standardized Model CGL excess and umbrella policy language, coverage parts and endorsements with the following provisions, among others:

(a) A retroactive date in the claims-made version;

(b) An absolute pollution exclusion in both versions; and

(c) Defense costs within the policy limits for both versions.

J. *The Pollution Property Coverage Boycott*

110. Specialized reinsurers in London and the United States have also agreed to boycott reinsurance and insurance policies for U.S. and Canadian property seepage and pollution exposures. These companies include Unionamerica, Terra Nova, Excess, Edwards & Payne, Kemper Re, Merrett Syndicate, Continental Re, and other unnamed co-conspirators. This conspiracy has had the effect of drastically restricting the availability and affordability of property pollution coverage in the United States, specifically including Connecticut.

111. The agreement to boycott the provision of property pollution insurance and reinsurance for North American exposures is memorialized in a document entitled "Non Marine London Market Agreement 1987" (hereinafter "Market Agreement"). This Market Agreement is

signed by over forty LMX Retrocessional reinsurers both at Lloyd's and in the London Company Market. "LMX" is the short hand for those retrocessional reinsurers who specialize in providing such reinsurance for the Lloyd's and London Company Market Companies.

112. The parties to the Market Agreement agreed to use their "best endeavors to ensure that all U.S.A. and Canadian exposed insurance/reinsurance business attaching on or after 1st January, 1987 will only be written where the original business includes a seepage and pollution exclusion wherever legal and applicable."

113. The Market Agreement to boycott property pollution coverage was subsequently agreed to by at least twenty-nine North American retrocessional reinsurers in the LMX market.

114. The agreed upon exclusion of seepage and pollution risks from property insurance and reinsurance policies has had a direct impact on U.S. primary insurers and insurance buyers. Insurance consumers who sought coverage for property exposures were no longer able to find primary insurers willing to provide such coverage.

FIRST CLAIM FOR RELIEF

CONSPIRACY AMONG ALL DEFENDANTS

115. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-114 above with the same force and effect as if here set forth in full.

116. Beginning on a date unknown to plaintiff, but at least as early as on or about March 1984, and continuing thereafter, the defendants and their co-conspirators have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the market for CGL property/casualty risks and for reinsurance and retrocessional reinsurance in connection therewith in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

117. Such contract, combination or conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and their co-conspirators, for the purpose and with the effect of shrinking the scope of CGL property/casualty insurance and reinsurance and retrocessional reinsurance in connection therewith in order to simultaneously reduce financial exposure to such risks and to increase underwriting profits therefrom. The substantial terms of the aforesaid agreement were:

(a) To substantially limit, if not eliminate, long tail risks from insurance, reinsurance and retrocessional reinsurance coverage;

(b) To eliminate the availability of CGL occurrence insurance, with its potential for long tail risks;

(c) To eliminate pollution coverage;

(d) To eliminate retroactive liability;

(e) To limit the risk for defendants of the high cost of defending liability claims against insureds;

(f) To conform CGL coverage, including ISO CGL forms, to the above limitations; and

(g) To conform excess and umbrella coverage to the above limitations.

118. In order to carry out the foregoing contract, combination or conspiracy, the defendants and their co-conspirators have done those things which they have combined or conspired to do, including, but not limited to:

(a) The use of boycott, coercion and intimidation in order to limit CGL coverage as aforesaid; and

(b) Meeting at various times, places and in different combinations for the purpose of developing and implementing a joint strategy to force the changes and limitations as aforesaid.

119. The aforesaid contract, combination or conspiracy, has had the following effects, among others:

(a) Competition in the insurance, reinsurance and retrocessional reinsurance markets for CGL coverage has been unreasonably restrained;

(b) Competition in the excess and umbrella insurance market has been unreasonably restrained;

(c) The availability of CGL property/casualty insurance for pollution risks has been substantially restricted;

(d) The availability of retroactive CGL coverage has been substantially restricted;

(e) The availability of insurance which will pay both the cost of defending liability claims in full and the policy limits for liability losses is being phased out;

(f) The extent of available CGL coverage has been substantially restricted;

(g) The price for CGL property/casualty coverage has been artificially increased; and

(h) The price of long tail risk coverage for CGL liability insurance has been artificially increased.

SECOND CLAIM FOR RELIEF

CONSPIRACY TO MANIPULATE ISO CGL FORMS

120. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-114 above, with the same force and effect as if here set forth in full.

121. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Hartford, Allstate, Aetna, CIGNA, ISO, Robin A.G. Jackson, Merrett Syndicate, Three Quays, Janson Greene, Edwards & Payne, C. J. W., Thomas A. Greene, R. K. Carvill, RAA, General Re, Constitution Re, Mercantile & General Re, Prudential Re, North American Re, Winterthur Swiss and other co-

conspirators have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks and the market for primary insurance coverage of CGL risks.

122. Such contract, combination or conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) To restrict the terms under which reinsurance coverage would be provided for CGL risks; and

(b) To refuse to provide reinsurance coverage for CGL risks unless ISO agreed to amend its 1984 CGL forms to incorporate defendants' terms.

123. For the purpose of forming and effectuating such contract, combination or conspiracy, defendants named in paragraph 121 and co-conspirators did those things which they combined or conspired to do, including, but not limited to, the following:

(a) Conducting meetings and discussions among themselves to agree on the terms under which they would reinsure CGL risks;

(b) Agreeing to boycott the 1984 ISO CGL forms, unless they were amended to comply with defendants' terms;

(c) Coercing and intimidating ISO and ISO members to adopt the coverage terms and exclusions agreed upon by defendants;

(d) Agreeing to incorporate the retroactive date coverage term and pollution liability exclusion language in the 1986 ISO CGL forms; and

(e) Agreeing to revise further the ISO CGL forms to provide for defense costs within policy limits, but agreeing to delay such revision until the changes in the retroactive date and pollution exclusion terms were introduced

to the market and approved by insurance regulators, where necessary.

124. This contract, combination or conspiracy has had the following effects, among others:

(a) The standard ISO CGL policy available in the State of Connecticut excludes all pollution liability coverage;

(b) The standard CGL claims-made policy available in the State of Connecticut excludes retroactive coverage;

(c) The price of pollution liability coverage and retroactive claims-made coverage, where it is available, has been increased;

(d) Competition in the market for pollution liability coverage and retroactive claims-made coverage has been unreasonably restrained; and

(e) Defense within policy limits is, or will be, a standard provision of CGL policies.

THIRD CLAIM FOR RELIEF

THE OCCURRENCE BOYCOTT: CONSPIRACY OF LLOYD'S REINSURERS TO COERCE PRIMARY INSURERS TO OFFER COVERAGE ONLY ON A CLAIMS-MADE BASIS

125. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-114 above with the same force and effect as if here set forth in full.

126. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Peter N. Miller, Robin A.G. Jackson, Merrett Syndicate, Three Quays, Janson Greene, Edwards & Payne, Ballantyne McKean and other co-conspirators have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks and the market for primary coverage of CGL risks.

127. Such contract, combination or conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) To restrict the terms under which reinsurance coverage would be provided for CGL risks;

(b) To refuse to reinsure those CGL risks written on an occurrence form; and

(c) To eliminate reinsurance coverage for "long-tail" risks covered by occurrence policies.

128. For the purpose of forming and effectuating such contract, combination or conspiracy, defendants named in paragraph 126 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) Conducting meetings and discussions among themselves to agree on the terms under which reinsurance would be made available for North American CGL risks;

(b) Agreeing to structure, promote and publicize a boycott of reinsurance for North American CGL risks by refusing to reinsure any other than those risks written on a claims-made CGL form, or by offering such reinsurance only when it was itself written on a claims-made basis;

(c) Coercing and intimidating primary insurers to use the claims-made form and reject the occurrence form; and

(d) Coercing and intimidating individuals who had spoken to, or had reason to so address, or might have commercial interest in speaking to, regulatory and or legislative bodies or officials concerning that body's or official's approval of the adoption or use of the claims made CGL form so as to influence or determine said individual's presentation to said officials or bodies.

129. The aforesaid contract, combination or conspiracy has had the following effects, among others:

(a) The market for occurrence CGL coverage available in the State of Connecticut was unreasonably restrained;

(b) Occurrence CGL coverage became unavailable, or limited in availability, in the State of Connecticut for many risks, including municipal general liability risks; and

(c) The price of occurrence liability coverage, where it is available, has been increased.

FOURTH CLAIM FOR RELIEF

CONSPIRACY OF LLOYD'S REINSURERS, BROKERS AND LONDON COMPANY MARKET REINSURERS TO BOYCOTT POLLUTION COVERAGE

130. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-114 above with the same force and effect as if here set forth in full.

131. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants, Merrett Syndicate, Murray Lawrence, Oxford, Edwards & Payne, D.P. Mann, C.J.W., Unionamerica, Terra Nova, CNA Re, and Ballantyne McKean, and other co-conspirators, have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the market for casualty reinsurance coverage for pollution risks and the market for primary casualty coverage of pollution risks.

132. Such contract, combination or conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) To restrict the terms under which casualty reinsurance coverage would be provided for CGL risks; and

(b) To limit the availability of pollution coverage in U.S. primary casualty insurance.

133. For the purpose of forming and effectuating such contract, combination or conspiracy, defendants named in paragraph 131 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) Conducting meetings and discussions among themselves to agree on the exclusive terms under which they would reinsure North American CGL risks; and

(b) Agreeing to exclude from all casualty treaty reinsurance written in London all pollution coverage for North American risks.

134. The aforesaid contract, combination or conspiracy has had the following effects, among others;

(a) Pollution liability coverage has become almost entirely unavailable for the vast majority of casualty insurance purchasers in the State of Connecticut;

(b) The price paid by plaintiffs for pollution liability coverage, where it is available, has dramatically increased; and

(c) Competition in the market for pollution liability coverage has been unreasonably restrained.

FIFTH CLAIM FOR RELIEF

LLOYD'S, LONDON COMPANY MARKET AND DOMESTIC RETROCESSIONAL REINSURER BOYCOTT OF PROPERTY POLLUTION COVERAGES

135. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-114 above with the same force and effect as if here set forth in full.

136. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Unionamerica, Terra Nova, Excess, Edwards & Payne, Kemper Re, Merrett Syndicate, Oxford, Continental Re, and unnamed co-conspirators have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the market for property insurance coverages for seepage, pollution and contamination exposures situated in North America, including the State of Connecticut.

137. Such contract, combination or conspiracy consisted of a continuing agreement, understanding and concert of action among such defendants and their co-conspirators, the substantial terms of which were:

(a) To restrict the terms under which property insurance and reinsurance coverage would be provided for North American risks; and

(b) To limit the availability of property insurance and reinsurance for North American risks.

138. For the purpose of forming and effectuating such contract, combination or conspiracy, defendants named in paragraph 136 and their co-conspirators did those things which they combined and conspired to do, including, but not limited to, the following:

(a) Conducting meetings and discussions among themselves to agree to coverage terms and exclusions for primary and reinsurance coverages for North American property insurance; and

(b) Agreeing to boycott the provision of all retrocessional reinsurance for any U.S. or Canadian primary or reinsurance property coverages unless the original insurance coverage includes a seepage, pollution and contamination exclusion clause.

139. The aforesaid contract, combination or conspiracy has had the following effects, among others:

(a) Property insurance and reinsurance policies written for U.S. and Canadian property risks, including all such risks in the State of Connecticut, now exclude a seepage, pollution and contamination clause;

(b) The prices for seepage, pollution and contamination property insurance coverages, where they are still available, have been increased; and

(c) Competition in the market for property seepage, pollution and contamination coverages has been unreasonably restrained.

SIXTH CLAIM FOR RELIEF

CONSPIRACY BY ISO, REINSURERS AND INSURERS TO RESTRAIN TRADE IN THE COMMERCIAL UMBRELLA AND EXCESS INSURANCE MARKETS

140. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-114 above with the same force and effect as if here set forth in full.

141. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, defendants ISO, Allstate, Hartford, Aetna, CIGNA, Merrett Syndicate, and Three Quays, and unnamed co-conspirators have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the markets for commercial umbrella and excess insurance coverages.

142. Such contract, combination or conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were to restrict terms and conditions under which insurance coverages would be available to purchasers of commercial umbrella and excess insurances.

143. For the purpose of forming and effectuating such contract, combination or conspiracy, defendants named in

paragraph 141 and their co-conspirators did those things which they combined and conspired to do, including, but not limited to, the following:

(a) Conducting meetings and discussions among themselves to agree to draft "model" forms and policy language for both umbrella and excess commercial insurance coverages; and

(b) Agreeing upon, drafting, and then promulgating such "model" forms and policy language for use in the umbrella and excess insurance markets.

144. This aforesaid contract, combination or conspiracy has had the following effect, among others: competition in the unregulated markets for commercial umbrella and excess insurance has been unreasonably restrained.

SEVENTH CLAIM FOR RELIEF

STATE LAW CLAIM: VIOLATIONS OF THE CONNECTICUT ANTI-TRUST ACT

145. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-144 above with the same force and effect as if here set forth in full.

146. The aforesaid contracts, combinations, or conspiracies in unreasonable restraint of trade and commerce are in violation of the Connecticut Anti-Trust Act, Conn. Gen. Stat. §§ 35-26 and 35-28.

PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment in its favor and that the Court:

147. Adjudge and decree that defendants and co-conspirators have engaged in an unlawful combination and conspiracy in restraint of trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 and the

Connecticut Anti-Trust Act, Conn. Gen. Stat. §§ 35-26 and 35-28.

148. Enjoin defendants, their officers, directors, employees, agents, successors, assigns, subsidiaries, members, and all other persons acting or claiming to act on their behalf, from in any manner, directly or indirectly, continuing, maintaining, or renewing the combinations or conspiracies hereinbefore alleged, and from engaging in any other combination, conspiracy, contract, agreement, understanding, or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

149. Order defendant trade associations to maintain accurate records of all attendees at every meeting of its Board, Executive Committee, or other committee or subcommittee meetings convened under its auspices, and to make a verbatim record of each such meeting, including meetings held by conference call, and to maintain such records for a period of at least five years after the dates of such meetings, and to make such records available, upon written request, to the Antitrust Department of the Office of the Attorney General of plaintiff State of Connecticut.

150. Order defendant trade associations to maintain true and correct copies of all speeches, press releases, official publications, and other public statements by an officer, director, employee, agent, or other person acting on behalf of it, or acting in a capacity reasonably likely to be taken to be on behalf of it and to make such available, upon written request, to the Antitrust Department of the Office of the Attorney General of plaintiff State of Connecticut.

151. Order defendant ISO to issue forms or form coverage parts which include all of the elements of the original 1984 ISO CGL forms, as thereafter lawfully amended.

152. Order defendant ISO to maintain statistical and rating support for the 1973 ISO CGL form and for the 1984 ISO CGL forms.

153. Order defendant ISO to provide any and all data maintained by ISO or received by ISO to any person, firm, public agency, or other entity requesting such data, conditioned only on payment of a reasonable, cost-based fee.

154. Order that defendant ISO be restructured in such manner as the Court determines is necessary to prevent further anticompetitive conduct.

155. Order each defendant reinsurer, and each member of the RAA to withdraw, in writing, any requirement it has imposed on any primary insurer that it exclusively implement claims-made forms for any of its CGL lines of business or which declare or create a boycott of any line or class of insurance, or any coverage part, and to submit copies of all such withdrawals to the Court and the Antitrust Department of the Office of the Attorney General of the State of Connecticut.

156. Enjoin defendants Thomas A. Greene, R. K. Carvill Co., and Ballantyne McKeane from providing information to any reinsurer on the prices, terms or conditions being imposed by any other reinsurer except as may be necessary in the course of negotiating a specific reinsurance contract on behalf of a specific, bona fide purchaser of reinsurance.

157. Enjoin each and every defendant from conditioning insurance or reinsurance on the insured's support for any action by any governmental entity or trade association.

158. Order all defendants to develop individual antitrust compliance programs, and manuals detailing same, to be approved by the Court, on notice to plaintiff, and to report on an annual basis for five years to the Court

and plaintiff's counsel with regard to compliance efforts pursuant thereto.

159. Order each and every defendant to establish and maintain a fund for the benefit of plaintiff and the parties on whose behalf this action has been brought for claims for which such persons would have had coverage but for defendants' violations of law.

160. Award three times the damages incurred by plaintiff and the parties upon whose behalf this action has been brought as a consequence of the aforesaid contracts, combinations or conspiracies.

161. Order each defendant to pay plaintiff State of Connecticut civil penalties in an amount to be determined by the Court, in accordance with Conn. Gen. Stat. § 35-38.

162. Order such other, further and different relief as the nature of the case may require and the court may deem just and proper.

163. Order defendants to pay plaintiff's costs of, and attorneys fees associated with, presenting this action.

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b), Federal Rules of Civil Procedure, and Rule 200-4, Local Rules, United States District Court, Northern District of California, Plaintiff demands trial by jury for all of the issues pled herein so triable.

DATED: June 14, 1988

JOSEPH I. LIEBERMAN
Attorney General of Connecticut

By: /s/ [Illegible]
ROBERT M. LANGER
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-88-1688-WWS
(All Cases)

IN RE: INSURANCE ANTITRUST LITIGATION

PRE-TRIAL ORDER NO. 2

[Filed Sep. 8, 1988]

A Status Conference having been held in open court on June 23, 1988, and good cause appearing.

IT IS HEREBY ORDERED that:

1. This Order and Pretrial Order No. 1 shall apply to all cases which are now or hereafter may be related to or consolidated with these proceedings.

2. *Answers.* No further answers shall be filed, including any answer to any complaint in actions hereafter related to or consolidated with these proceedings, until further order of the Court. Any party may for good cause make application to the Court for such an order.

3. *Motions, briefing schedule.* The Court establishes the following schedule for the filing of and response to motions under Rules 12 and 56 of the Federal Rules of Civil Procedure:

a. By December 16, 1988, the parties shall file and serve those motions which they believe are dispositive of any claim or issue in this litigation based on the facts alleged in the complaints and other relevant information in their possession. Motions shall not be filed that turn on

disputable issues of evidentiary fact. Any party may join into any motion by filing a statement to that effect.

b. By April 28, 1989, the parties shall file and serve their responses, including cross-motions for summary judgment, to the dispositive motions.

c. Within 21 days after the filing of responses by the States, the private plaintiffs shall file and serve any supplemental response on issues which they deem not to have been fully covered by the States. The private plaintiffs shall also file statements indicating the motions in which they join.

d. By June 16, 1989, the parties shall file and serve their replies to the responses to the dispositive motions and any responses to cross-motions.

e. By June 30, 1989, the parties shall file and serve their replies to responses to cross-motions.

f. On July 7, 1989, or such other date as the Court may fix, argument on the motions shall be heard.

g. To the extent that such motions are filed under Rule 12 of the Federal Rules of Civil Procedure, the motions need not include all defenses or objections available to the moving party(s), notwithstanding the provisions of Rule 12(g), and no objection or defense not included shall be deemed waived, notwithstanding the provisions of Rule 12(h)(1).

4. *Page limitation.* To the extent that motions, responses and replies made pursuant to paragraph 3 above raise certain common legal issues, not more than one memorandum of law addressed to each such common issue shall be submitted on behalf of either the States or the defendants. Each such memorandum of law shall be subject to the 25-page limit. The application of Local Rule 220-4 is to this extent waived. For purposes of this paragraph only, the McCarran-Ferguson Act, *Parker v. Brown*, the Noerr-Pennington doctrine and subject matter jurisdiction shall each be deemed to constitute a single legal issue.

5. *Discovery schedule and limitation.* Discovery may be conducted by the parties, to the extent necessary to bring or respond to the motions outlined in paragraph 3, until December 16, 1988. Such discovery shall be further limited to matters which are not expected to raise disputable issues of fact. Specifically, no discovery shall seek evidentiary facts known to and contentions made by an opposing party bearing on the liability of the discovering party. After motions have been filed, upon specific request by any party having to respond to a motion, the Court may permit specified discovery for that purpose. Similarly, any party having to reply to a responsive brief may, for good cause, apply to the Court for leave to conduct specific discovery for the limited purpose of such reply.

The parties are encouraged to exchange relevant information in aid of the proceedings outlined in this Pretrial Order.

6. *Class certification motions stayed.* Pursuant to Local Rule 200-6(c), institution of any proceedings related to class determination pursuant to Rule 23 of the Federal Rules of Civil Procedure is stayed until further order.

7. No letter or other communication or proposed order (except any proposed order submitted with any duly noticed motion), including any emergency communication or application, shall be addressed to the Court without prior service upon all other parties and actual prior receipt by a facsimile transmission to all Administrative Liaison Counsel not less than twenty-four hours before delivery to the Court.

8. The parties shall meet and confer with regard to a protective order and a retention order for these proceedings and submit them to the Court when agreement is reached, or failing agreement, seek guidance from the Court through a conference call arranged by Administrative Liaison Counsel.

9. Guido Saveri and his firm, Saveri & Saveri, is appointed to serve as Administrative Liaison Counsel for the private plaintiffs.

IT IS FURTHER ORDERED that paragraphs 2, 3, and 4 of Pretrial Order No. 1 be revised, as follows:

2. The Court shall maintain a master docket and case file entitled "In re Insurance Antitrust Litigation:" under master file number C-88-1688-WWS. All orders, pleadings, motions and other documents shall be filed and docketed only in the master case file and shall be deemed filed and docketed in each individual case to the extent applicable.

3. Orders, pleadings, motions and other documents shall bear the same caption as this Order. If generally applicable to all consolidated actions, such papers shall state below the civil action number "(All Cases)". If applicable only to a particular case or cases, such papers shall bear as a double-caption the same caption as this Order and the caption of the individual case and, immediately above the civil action number of the individual case, shall state "Also relates to:". The filing party shall provide the clerk with the original and one copy of all such documents.

4. Documents shall be served as follows:

(a) The clerk shall provide one copy of any order or other communication of the court to each Administrative Liaison Counsel for him to distribute to the other counsel and parties for whom he has been appointed;

(b) Each pleading or document required to be served shall be served by hand on each Administrative Liaison Counsel whose office is in the city of the person making the service; otherwise service shall be by overnight mail. Service shall also be made upon one attorney for each other party in all related and consolidated proceedings. Each party shall designate the attorney upon whom

service shall be made. Service of such papers shall be by first class United States mail and, only for purposes of calculating when a subsequent paper must be served or filed, service shall be deemed effective seven (7) days after mailing. Administrative Liaison Counsel shall prepare and update as necessary a list of counsel for each party for purposes of service. Such lists and any updates shall be provided to all parties.

IT IS SO ORDERED.

DATED: September 8, 1988

/s/ William W Schwarzer
WILLIAM W SCHWARZER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-88-1688-WWS
(All Cases)

IN RE: INSURANCE ANTITRUST LITIGATION

PRE-TRIAL ORDER NO. 4

[Filed Jan. 3, 1989]

In its Pre-Trial Order No. 2, filed September 8, 1988, the Court ordered that by December 16, 1988, "the parties shall file and serve those motions which they believe are dispositive of any claim or issue in this litigation based on the facts alleged in the complaints and other relevant information in their possession. Motions shall not be filed that turn on disputable issues of evidentiary fact. Any party may join into any motion by filing a statement to that effect."

Defendants have now filed several motions, including motions for summary judgment by several reinsurer defendants on the ground that there is no evidence indicating that they were parties to any illegal agreement ("no-conspiracy motions"). The Court defers decision on the no-conspiracy motions until after decision has been entered on pending motions based on dispositive legal issues, and no such motions shall be filed without further order of the Court.

IT IS SO ORDERED.

DATED: January 3, 1989

/s/ William W Schwarzer
WILLIAM W SCHWARZER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 88-1688 WWS
(All Cases)

IN RE INSURANCE ANTITRUST LITIGATION

STIPULATION RE SUSPENSION OF PLAINTIFF STATES' DISCOVERY AGAINST DEFENDANTS

[Filed March 29, 1989]

The Plaintiff States (hereinafter "the States") and all Defendants (hereinafter "Defendants") hereby stipulate and agree as follows:

1. On November 8, 1988, the Plaintiff States served by mail the following discovery requests:

a. Plaintiff States' First Interrogatories to Defendant Primary Insurers;

b. Plaintiff States' First Request for Production of Documents to Defendant Primary Insurers;

c. Plaintiff States' First Interrogatories to Defendant London Reinsurers;

d. Plaintiff States' First Request for Production of Documents to Defendant London Reinsurers;

e. Plaintiff States' First Interrogatories to Defendant U.S. Reinsurers;

f. Plaintiff States' First Request for Production of Documents to Defendant U.S. Reinsurers;

g. Plaintiff States' First Interrogatories to Defendant Brokers;

h. Plaintiff States' First Request for Production of Documents to Defendant Brokers;

i. Plaintiff States' First Interrogatories to Defendants ISO and RAA; and

j. Plaintiff States' First Request for Production of Documents to ISO and RAA.

2. Under the civil rules and Pretrial Order No. 2, the discovery requests imposed an obligation to respond or object on or before December 15, 1988.

3. On November 23, 1988, representatives of the States and representatives of Defendants participated in a telephone conference call to discuss the States' discovery requests. During the call the States' representatives stated that the discovery requests were designed to elicit information needed to respond to factual issues anticipated in three motions which the States expected Defendants to file on December 16, 1988: *i. e.* motions directed to (1) extraterritoriality/comity; (2) standing; and (3) antitrust injury.

4. During the same conference call, representatives of Defendants represented and later confirmed by letter, that:

a. any defense motions on extraterritoriality/comity and standing will be addressed to the allegations of the complaints and are not intended to introduce any factual questions;

b. the defendants do not intend to bring a separate motion on antitrust injury and if the issue is referenced in any other motion, the legal issue will be discussed without introducing facts outside the allegations of the complaints; and

c. none of the foreign defendants intends to contest personal jurisdiction in this group of motions.

5. Based on the foregoing assurances Defendants requested, and the States agreed, that the Defendants' obli-

gation to respond or object to the States' discovery be suspended at least until defendants' motions have been filed.

6. The Defendants' motions are consistent with the Defendants' representations and accordingly the States have agreed that Defendants' obligation to respond or object to the States' discovery shall be suspended until further notice.

DATED this 30th day of January, 1989.

For the Plaintiff States:

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(Names and addresses for other counsel for Plaintiff States appear on attached Master Service List of Plaintiff States)

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Administrative Liaison Counsel for Defendants
Attorney for Defendant Hartford Fire Insurance Company

(Names and addresses for other defense counsel appear on attached Defendants' Service List)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C 88-1688 WWS
(All Cases)

IN RE INSURANCE ANTITRUST LITIGATION

PRETRIAL ORDER NO. 6
[Filed Mar. 29, 1989]

ORDER SUSPENDING PLAINTIFF STATES' DISCOVERY AGAINST DEFENDANTS

The Court having considered the Stipulation re Suspension of Plaintiff States' Discovery Against Defendants and good cause appearing,

IT IS HEREBY ORDERED *NUNC PRO TUNC*, THAT:

The defendants' obligation to respond to the discovery served by the plaintiff states on November 8, 1988, is suspended until the plaintiff states both provide written notification of the reinstatement of any such discovery against any defendant and also obtain leave of this Court to conduct such discovery.

DATED: 3/29/89

/s/ William W Schwarzer
WILLIAM W SCHWARZER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C-88-1688-WWS
(All Cases)

IN RE INSURANCE ANTITRUST LITIGATION

AFFIDAVIT OF CAROLE BANFIELD

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

CAROLE BANFIELD being duly sworn states as follows:

1. I am Senior Vice President, Government Relations at Insurance Services Office, Inc. ("ISO"). I was an employee of Insurance Services Office when it was formed in 1971 and have had supervisory responsibility for the Government Relations Department since 1979. I have read the Defendants' Motion For Judgment On The Pleadings Or, In The Alternative, Summary Judgment On McCarran-Ferguson Grounds, and I make this affidavit in support of that motion.

2. ISO is a non-profit corporation of over 600 member insurance companies. ISO is licensed in all 50 states as a rating, rate service or advisory organization for property and casualty lines of insurance. One of its primary functions is to develop standardized property and casualty insurance policy forms that comply with statutory standards and are acceptable to insurance departments in all states for use in providing insurance.

3. Since 1977, I have been in charge of providing state insurance regulators with information about ISO filings including newly filed ISO policy forms and of responding to their questions and concerns. I have also worked closely with state insurance regulators in these and other areas. Additionally, I have served as a member of numerous advisory committees of the National Association of Insurance Commissioners, an association made up of regulators from all 50 states.

4 Beginning in March 1984 ISO filed, with insurance departments in every state, two proposed new versions of a standardized policy form for general liability insurance, known as the Commercial General Liability ("CGL") form. I supervised those filings, which were made on behalf of participating insurers. CGL forms are designed to provide insurance coverage to businesses and governmental entities against the risk of liability to third parties for bodily injury or property damage.

5. The new versions of the CGL form were intended to replace an old standardized policy form for general liability insurance that had been filed with state insurance departments in 1973. That form had been accepted by insurance departments and was available for use in every state. (A copy of that form is attached as Exhibit A).

6. The new forms, as proposed in March 1984, significantly redesigned the 1973 form and modified the insurance coverage provided. The 1973 policy form provided coverage for bodily injury and property damage occurring during the policy period (this is known as an "occurrence" form). One of the new CGL policy forms, as proposed in March 1984, was also an occurrence form, but the terms and conditions of coverage were modified in many respects. The second proposed new CGL form provided coverage for bodily injury and property damage for which a claim is made during the policy period or extensions thereof (this is known as a "claims-made" form). (The coverage

parts of these proposed forms are attached as Exhibits B and C). Claims-made policy forms had previously been developed by ISO and others for different lines of insurance, such as medical malpractice.

7. When ISO filed its proposed new policy forms with state insurance departments beginning in March 1984, we proposed that the forms not become effective until November 1985. As the cover letter to those filings indicates, we explained to insurance departments that the intervening period would allow them sufficient time to review the new forms thoroughly, would allow producers, consumers and other interested groups sufficient time to consider the changes in the new forms, and would allow ISO sufficient time to explain the changes and to file with insurance departments all of the additional information (*e.g.*, advisory rates, rules, endorsements) needed to use the new forms. (A sample cover letter is attached as Exhibit D). The proposed effective date was later extended into 1986.

8. I, and other ISO employees under my direction, had frequent communications with state insurance departments concerning the proposed new CGL forms during the period (from March 1984 into 1986) when the forms were under regulatory review. We received requests from state insurance regulators for additional information, responded to questions, and had discussions with them about the scope of insurance coverage under the CGL forms. For example, shortly after the March 1984 filing, the Arizona Department of Insurance forwarded written questions about the forms and invited ISO to respond to a number of concerns that had been raised. The following year, the Arizona Department called for a public hearing to discuss numerous concerns it still had concerning the forms. (*See* Arizona documents in Exhibit N.)

9. ISO and the insurance regulators also discussed the proposed new forms with other interested parties, includ-

ing insurers, agents, brokers, domestic and foreign reinsurers, and corporate risk managers. The discussions were sometimes heated and the industry-wide scrutiny was intense. For example, in August 1985 ISO representatives and insurance regulators from Maryland, the District of Columbia, and Virginia met with representatives from the Potomac chapter of the largest association of business insureds, The Risk and Insurance Management Society, Inc. ("RIMS"), to discuss objections that they had raised to the new claims-made form. (Attached as Exhibit E is a copy of the written objections, including objections to the retroactive date provisions, that the Potomac chapter of RIMS forwarded to ISO in advance of the meeting).

10. On many occasions, I and other ISO employees under my direction had discussions with regulators and members of these other groups about concerns and conflicting views expressed about different aspects of the forms. The issues we discussed included: (i) whether the forms should provide an occurrence trigger of coverage, a claims-made trigger or some other type of trigger, and whether ISO should provide a single policy form or alternative forms utilizing two different triggers; (ii) whether or to what extent claims-made coverage should be provided for injuries which occurred before the policy period or from claims which were reported after the policy period; (iii) whether or to what extent the pollution exclusion could or should be modified; and (iv) whether defense costs should be included within the policy limits.

11. During the period from 1984 through 1986, we also attended public hearings and forums before insurance regulators in 35 states at which we and members of these other groups expressed differing viewpoints on the new forms. Attorneys general from some of the states also expressed their views concerning the proposed forms. Numerous changes to the forms, including changes to the

provisions challenged by plaintiffs, were urged upon state insurance regulators and ISO at these hearings. For example, in connection with public hearings before the New York Insurance Department, the Attorney General of New York submitted written comments dated June 12, 1985 opposing the December 1984 provisions relating to pollution coverage and retroactive dates (see paragraph 15 below). (A copy of the comments is attached as Exhibit F).

12. The National Association of Insurance Commissioners met in December 1985, discussed the proposed CGL forms filed by ISO, and adopted a model act relating to certain aspects of claims-made policies. I attended the meetings of NAIC and the committee that recommended adoption of such a model act. Both before and after those meetings, ISO made a number of changes to the CGL forms in response to the points raised at the meetings and to the requirements of the model act.

13. Differing viewpoints on the proposed forms, and in particular on the provisions now challenged by plaintiffs, also appeared in the press. (Attached as Exhibit G is a sample of the press articles).

14. In response to the various opinions expressed and to regulatory actions discussed in paragraph 17, ISO revised the proposed forms four times before the ISO CGL program became effective beginning on January 1, 1986. I supervised the filing with state insurance departments of each of the four revisions. Each of these supplemental and amended filings included a description of significant changes in the forms. Exhibit H hereto is a chart reflecting the various ISO filings, hearings thereon in the states that are plaintiffs or in which private plaintiffs reside, and approvals, disapprovals and effective dates for use of the policy forms in those states.

15. Plaintiffs in this case challenge certain provisions relating to retroactive dates and pollution coverage. Those

provisions were included in the first set of revisions that ISO filed in December 1984, before most of the state regulatory proceedings relating to the new forms took place. The retroactive date provision did not impose any standardized restriction on retroactive coverage but instead provided insurers and insureds another means of adding such a restriction to the policy if they chose to do so. The revised pollution exclusion afforded narrower coverage than the March 1984 filings, but the transmittal letter for the December filings advised that ISO would draft an optional endorsement and separate pollution liability policy forms providing broader coverage. (Exhibit I is a sample transmittal letter; Exhibits J and K are the December 1984 occurrence and claims-made filings). In 1985, ISO filed such an endorsement as a standardized optional amendment to the new CGL forms and also filed two separate pollution liability policy forms. (See Exhibits L and M).

16. ISO identified and explained each of these changes in the materials that accompanied the December 1984 filings; and noted that the changes had arisen out of a "review and dialogue with a broad range of industry interests, including producer organizations, domestic and foreign reinsurers and our own participating insurers." (Exhibit I, p. 1.) In addition, I highlighted these changes for insurance regulators at the December 1984 meeting of the Property and Casualty Insurance (D) Committee of the National Association of Insurance Commissioners. These changes were subsequently discussed in numerous conversations that I had with insurance department officials before the final revised forms became effective in early 1986 and at many of the public hearings and forums called by state insurance regulators. For example, at a forum called by insurance regulators from 19 states on July 25, 1985, representatives from ISO, certain U.S. casualty insurers, domestic and foreign reinsurers and trade associations expressed their views on the proposed revisions to the terms and conditions of the CGL forms.

17. Numerous states, including plaintiffs Connecticut, Illinois, Michigan, Minnesota, Washington, and West Virginia, disapproved or refused to approve the revised forms filed in December 1984 and/or in 1985, but subsequently approved the forms after additional modifications were made. (Insurance department letters reflecting such changes in position are attached as Exhibit N, and the 1986 versions of the coverage parts are attached as Exhibits O and P). Some of these subsequent modifications related to the provisions that had been added in December 1984—for example, limitations on the primary insurers' ability to advance the retroactive date in the claims-made form (if one had been established) were added in 1985.

18. Certain interested groups, including RIMS, also withdrew their opposition to the forms as revised in December 1984 after additional revisions were made to other provisions in the forms by early 1986. (The RIMS letter withdrawing opposition—but continuing to criticize various aspects of the forms, particularly the claims-made form—is attached as Exhibit Q).

19. Only two states, Massachusetts and New Jersey, declined to approve both 1986 versions of the CGL form. In those states, the old 1973 form is still in use. Both of those states were among the 35 that held public hearings or forums in which I or persons reporting to me participated. Four other states—Nebraska, New York, Texas and Vermont—rejected the 1986 version of the claims-made form but approved the 1986 version of the occurrence form. All four were also among the states that held public hearings before deciding whether to approve the 1986 version of the new forms.

20. Massachusetts and New Jersey have approved endorsements to the old 1973 form that include limitations on pollution coverage identical to those provided in the 1986 CGL forms approved in other states. The revised pollution language (as well as separate policy forms and

endorsements providing broader pollution coverage) is thus available in all 50 states.

21. None of the versions of the new CGL form filed by ISO ever included defense costs within the specified coverage limits.

22. In June 1986, ISO provided insurance companies with advisory material (Exhibit R regarding excess and umbrella insurance*). This material was expressly designed "to assist companies in developing their own Commercial Umbrella Liability policy forms," and it included language that would—if used by the insurance companies—dovetail with ISO's new CGL policy forms and avoid possible coverage gaps. The material was not a policy form and was not filed with the state insurance departments. The advisory material prepared by ISO addresses concerns expressed by certain insurance regulators that gaps in the coverage available under primary, excess, and umbrella policies be avoided. (Examples of documents reflecting such expressions of concern are included as Exhibit S).

/s/ Carole Banfield
CAROLE BANFIELD

Subscribed and sworn
to before me this
8th day of December, 1988

/s/ Joseph P. Giasi, Jr.
Notary Public

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* Excess policies provide additional coverage beyond that provided in the underlying policy, namely, coverage at higher dollar amounts than the limits set in the underlying policy. Umbrella policies provide both excess coverage and coverage for liability exposures not insured in the underlying policy.

MAJOR CGL PROGRAM POLICY FORM FILINGS IN PLAINTIFF STATES

State	Initial Form Filing(1)	First Revision Filing(2)	Second Revision Filing(3)	Third Revision Filing(4)	Fourth Revision Filing(5)	Hearing Dates	Regulatory Dispositions	Effective Date
Alabama	03/07/84	12/05/84	02/12/85	10/28/85	01/17/86	—	Approved—01/21/86	02/01/86
Alaska	03/02/84	12/04/84	02/13/85	10/28/85	01/16/86	10/09/85	Filing A Deemed Approved—04/30/84 Filing B Deemed Approved—01/06/85 Filing C Deemed Approved—02/25/85 Filing D Deemed Approved—11/04/85 Filing E Deemed Approved—02/19/86	02/01/86
Arizona	03/05/84	12/04/84	02/13/85	10/28/85	01/17/86	06/20/85, 07/25/85*	Disapproved—12/17/85 Approved—02/07/86	02/07/86
California‡	03/06/84	12/04/84	02/14/85	10/28/85	01/20/86	—	—	Available For Use—02/01/86
Colorado‡	03/06/84	12/04/84	02/13/85	10/28/85	01/17/86	—	—	Available For Use—02/01/86
Connecticut	03/08/84	11/30/84	02/15/85	10/28/85	01/17/86	07/25/85*, 11/13/85**	Disapproved—07/12/85 Disapproved—12/31/85 Approved—02/05/86	02/05/86
Florida	03/05/84	12/05/84	02/14/85	10/31/85	01/16/86	07/25/85*, 05/02/86	Approved—01/27/86	02/01/86
Illinois	03/07/84	12/04/84	02/15/85	10/28/85	01/16/86	07/25/85*, 08/28/85, 11/13/85**	Disapproved—04/15/84 Disapproved—12/30/85 Approved—01/27/86	02/01/86
Maryland	03/08/84	12/04/84	02/12/85	10/28/85	01/16/86	05/10/84, 02/13/85 07/15/86	Filings A, B, C Approved—06/03/85 Filing D Approved—11/21/85 Filing E Approved—01/23/86	02/01/86
Massachusetts	03/08/84	11/30/84	02/15/85	10/28/85	01/17/86	06/27/86 to 07/14/86	Filing A Approved—04/17/84 Filing B Approved—12/13/84 Filing C Approved—02/27/85 Approvals Withdrawn by Stipulation—06/27/86 Unbundled Occurrence Form Filed—05/01/86	Not Approved

(1) See Notes to Filings.
(2) See Notes to Filings.
(3) See Notes to Filings.
(4) See Notes to Filings.
(5) See Notes to Filings.
* First Illinois Forum
** Second Illinois Forum
‡ Filings not required by state law, informational filings made by ISO.

MAJOR CGL PROGRAM POLICY FORM FILINGS IN PLAINTIFF STATES—Continued

State	Initial Form Filing[1]	First Revision Filing[2]	Second Revision Filing[3]	Third Revision Filing[4]	Fourth Revision Filing[5]	Hearing Dates	Regulatory Dispositions	Effective Date
Michigan	—	12/11/84	02/15/85	10/28/85	01/17/86	07/25/85*, 11/13/85**	Disapproved—12/04/85 Unbundled Occurrence Form Filed—03/14/86 Unbundled Occurrence Form Approved—05/01/86 Unbundled Claims Made Form Filed—11/19/86 Unbundled Claims Made Form Approved—12/30/86	Occurrence Form—05/01/86 Claims Made Form—01/01/87
Minnesota	03/05/84 (Filing Withdrawn 11/16/84)	12/04/84	02/25/85	10/28/85	01/16/86	07/25/85*, 10/23/85, 11/13/85**	Disapproved—09/04/85 Disapproval Affirmed—12/20/85 Approved—04/08/86	04/08/86
Montana	03/02/84	12/04/84	02/13/85	10/28/85	01/16/86	—	Filing A Approved—03/16/84 Filing B Approved—12/10/84 Filing C Approved—02/20/85 Filing D Approved—10/31/85 Filing E Approved—01/21/86	02/01/86
New Jersey	03/08/84	12/04/84	02/14/85	10/28/85	01/23/86	10/11/85, 11/13/85** 12/18/85	Disapproved—12/31/85 Unbundled Occurrence Form Filed—05/02/86 Unbundled Occurrence Form Disapproved—06/06/86	Not Approved
New York	03/13/84	12/05/84	02/14/85	10/29/85	01/17/86	05/16/85, 07/25/85*	Disapproved—10/11/85, 02/12/86 Unbundled Occurrence Form Filed—03/17/86 Unbundled Occurrence Form Approved—03/21/86	09/01/86—Occurrence Form Only

(1) See Notes to Filings.
(2) See Notes to Filings.
(3) See Notes to Filings.
(4) See Notes to Filings.
(5) See Notes to Filings.
* First Illinois Forum
** Second Illinois Forum
‡ Filings not required by state law, informational filings made by ISO.

MAJOR CGL PROGRAM POLICY FORM FILINGS IN PLAINTIFF STATES—Continued

State	Initial Form Filing(1)	First Revision Filing(2)	Second Revision Filing(3)	Third Revision Filing(4)	Fourth Revision Filing(5)	Hearing Dates	Regulatory Dispositions	Effective Date
Ohio	03/06/84	12/05/84	02/14/85	10/29/85 (Filing Withdrawn 12/24/85)	03/19/86	11/13/85**	Unbundled Occurrence Form Filed—03/17/86	05/01/86
Pennsylvania	03/08/84	12/04/84	02/14/85	10/28/85	01/16/86	07/25/85*, 11/13/85**, 04/04/86	Approved—07/02/86	09/01/86
Washington	03/19/84	12/04/84	02/13/85	10/28/85	06/04/86	06/26/86, 07/31/86	Disapproved—12/20/85 Unbundled Occurrence Form Filed—03/14/86 Unbundled Occurrence Form Disapproved—03/20/86 Unbundled Occurrence Form Approved—06/12/86 Claims Made Form Approved—11/26/86, 01/16/87	Occurrence Form—07/15/86 Claims Made Form—01/01/87
West Virginia	03/06/84	12/05/84	02/13/85	10/29/85	01/16/86	—	Disapproved—05/04/84 Approved—05/29/86	07/01/86
Wisconsin	03/07/84	12/04/84	02/15/85 (Filing Withdrawn and Resubmitted 04/9/85)	10/28/85	01/16/86	07/25/85*	Approved—04/18/85, Undated Approval Received—01/06/86 State Specific Endorsements Filed—03/31/86	02/01/86

(1) See Notes to Filings.

(2) See Notes to Filings.

(3) See Notes to Filings.

(4) See Notes to Filings.

(5) See Notes to Filings.

* First Illinois Forum

** Second Illinois Forum

‡ Filings not required by state law, informational filings made by ISO.

NOTES TO FILINGS

(1) *Initial Forms Filing*—Introduction of simplified occurrence and claims-made forms. The filing included only the two basic policy forms with the understanding that endorsements, rules, classifications and rates would be filed later.

(2) *First Amendment Filing*—(i) The claims-made form was amended by:

(a) Providing for the optional entry of a retroactive date on the declarations page of the policy. Previously a retroactive date or other means of excluding retroactive coverage could have been included by endorsement. Once a retroactive date is inserted by the insurer or its agent, the policy is intended to respond only to bodily injury or property damage occurring after that date for which claim is made during the policy period.

(b) Providing the insured with a 60 day period after non-renewal to decide whether to purchase an optional extended reporting period of unlimited duration ("unlimited duration reporting period") at a price capped at 200% of the expiring policy's annual premium.

(ii) The pollution exclusion in both the claims-made and occurrence forms was revised. The pollution coverage in the basic forms was limited to damages arising out of products or completed operations and certain off-premises discharges of pollutants.

(3) *Second Amendment Filing*—(i) The claims-made form was amended by adding an automatic 60 day extended reporting period upon the expiration of coverage for any reason except non-payment of premiums. During this extended reporting period, the policy would continue to respond to claims made

during the 60 days immediately following the termination of the policy arising from occurrences of injury within the policy period.

(ii) An endorsement for both the claims-made and occurrence forms was filed that, if purchased, would restore certain pollution coverage previously excluded from the basic forms.

(4) *Third Amendment Filing*—The claims-made form was amended by:

(a) Adding an automatic five-year extended reporting period upon termination of the policy for any reason (except for non-payment of premiums), advancement of the retroactive date or replacement of the policy with an occurrence type policy. Under this provision, any claims resulting from occurrences of injury which occurred and were reported to the insurer during the policy period would be covered if made within five years of the termination of the policy. This provision would not apply if another insurance policy covered the claim.

(b) Providing that a claim would be deemed to have been made when notice of such claim was "received and recorded" by the insured or insurer. This change eliminated the requirement of written notice of a claim.

(c) Providing a manual rule limiting the conditions under which a retroactive date could be advanced.

(d) Filing an endorsement reinstating policy aggregate limits during the unlimited duration reporting period for previously unreported occurrences of injury.

(5) *Fourth Amendment Filing*—(i) The claims-made form was amended by:

(a) Providing that the first named insured, upon written request, is entitled to information on paid and reserved loss amounts and occurrences of injury reported directly to the insurer. Such information would be provided automatically upon cancellation or non-renewal by the insurer.

(b) Providing that cancellation for non-payment of premiums would no longer bar the 60-day and 5-year automatic extended reporting periods.

(c) Revising the unlimited duration reporting period endorsement to incorporate supplemental aggregate limits equal to those in effect at the termination of the policy for claims first received and recorded during the optional extended reporting period.

(ii) Both the occurrence and claims-made forms were amended to require the insurer to give the insured 30 days' written notice if the insurer elects not to renew the policy.

[EXHIBIT I]

[INSURANCE SERVICES OFFICE, INC. LETTERHEAD]

December 4, 1984

Honorable S. David Childers
Director of Insurance
Department of Insurance
1601 West Jefferson
Phoenix, Arizona 85007

GL 84-084CP (A)
Commercial General Liability Policy
Versions: CG 00 01 and CG 00 02
Common Policy Conditions IL 00 17

Dear Director:

On behalf of those participating companies which have authorized Insurance Services Office, Inc. to do so, we hereby file an amendment to the captioned filing, which was submitted under date of March 5, 1984 to become effective November 1, 1985. The attached amendment includes a new Commercial General Liability Policy form, in two versions. Submitted with the forms is an Explanatory Memorandum, as well as General Instructions, optional Quick References and advisory Declarations pages.

Our previous filings of Rules (GL 84-084RU), Classifications (GL 84-084CT) and Endorsements (GL 84-084EP) to be used with this Program will be supplemented to incorporate the changes made to the coverage Forms as well as to include material not previously submitted.

As noted in the attached Explanatory Memorandum, ISO's new Commercial General Liability policy has been the subject of review and dialogue with a broad range of industry interests, including producer organizations, domestic and foreign reinsurers and our own participating insurers. During the several months since the Commercial General Liability policy was submitted to regula-

tion, the industry review has continued to affect the design of the new program.

As outlined below and as detailed in the attached Explanatory Memorandum, the product of this most recent review involves substantive change to the policy forms—both in the "claims-made" and "occurrence" versions—and to the proposed rules of application to the program.

The attached "claims-made" version of the CGL Policy, CG 00 02, now incorporates a Retroactive Date provision. This provision, to be keyed by appropriate entry on the Declarations, is common to most "claims-made" contracts now in the marketplace; its insertion as a standard policy provision will mean that the policy will not respond to bodily injury or property damage which occurs before the Retroactive Date shown. In the "claims-made" form previously submitted, a Retroactive Date would have been made available only by endorsement.

Safeguards to protect the insured from potential coverage gaps have been built into Section V—Extended Reporting Period Option of the "claims-made" form; the Extended Reporting Period Endorsement ("tail") will be available to the insured if the company renews the policy with a retroactive date later than that in the policy renewed, or if the policy is renewed with an "occurrence" form.

Additional changes to Section V includes:

> An extension in the period of time during which the insured may elect to purchase the "tail" after policy termination. The amended "claims-made" form now provides that the insured has a 60-day period to exercise the "tail" option when he or the company nonrenews. Cancellation by either party will result in a 30-day period—which amounts, in effect, to 60 days upon company cancellation since the company must give 30 days notice of policy cancellation.

The maximum price for the Extended Reporting Period Option as well as a listing of price determinants are now incorporated within the policy.

As originally submitted, both versions of the Commercial General Liability policy incorporated a limited scope of coverage for pollution liability, as intended under current contracts. But the intended scope of coverage continues to be expanded by court interpretation. Taking this trend into account, it is the consensus of our insurer committee that the attempt to strengthen and clarify the policy language in the original edition of the CGL might fare no better in the courts than the current wording.

Accordingly, the program as amended contemplates a new approach: the basic CGL contracts now exclude coverage for bodily injury, property damage and associated expenses arising from the discharge of pollutants. This exclusion does not run, however, to damages arising out of products or completed operations and to certain off-premises discharges of pollutants. Underscoring current intent, clean-up and other costs are now subject to specific exclusion.

Future submissions will include coverage mechanisms for pollution liability; as an optional endorsement available with both versions of the CGL policy, coverage will be available for both sudden and non-sudden events, but not for clean-up and associated expenses. Additional coverage will be available under the "claims-made" Pollution Liability Coverage Parts.

The "GL" prefix for the Commercial General Liability forms is changed with this amendment to "CG" to avoid the confusion between the current and new programs. Forthcoming amendments to the Commercial General Liability endorsements portfolio, classifications and rules will carry through this change to the balance of the new program.

The lead-time requirements of our participating companies to implement the new CGL program, as well as the Com-

mercial Lines Policy and Rating Simplification program in its entirety, have resulted in a revised proposed effective date for the captioned filing. Therefore, ISO proposes that the new forms become effective on January 1, 1986 under the following rule of application:

> The Commercial General Liability Policy, versions CG 00 01 and CG 00 02 with the Common Policy Conditions, is available for use with policies written on or after January 1, 1986. Any participating insurer may select any other date up to January 1, 1987 with appropriate Insurance Department notification.

With this flexible implementation rule, ISO will continue to provide full rule and rate service for the current policy forms until January 1, 1987.

Before closing, I have been asked to remind you that ISO has no adherence requirements. ISO's policy forms and explanatory materials are intended solely for the information and use of ISO's participating insurers and their representatives. Those forms and materials cannot eliminate all uncertainty as to whether or how insurance applies in every set of circumstances. Neither ISO's general explanations of policy intent (including hypothetical examples) nor opinions expressed by members of ISO's staff necessarily reflect every insurer's views or control any insurer's determination of coverage for a specific claim. ISO neither interprets insurance policies for the contracting parties nor intercedes in coverage disputes.

We will appreciate your early review and approval of this filing, and will be glad to respond to any questions you may have.

Very truly yours,

/s/ Michael L. Vetter
MICHAEL L. VETTER
Regional Manager

[EXHIBIT N]

NOTICE OF DECISION

YOU ARE HEREBY NOTIFIED, that pursuant to Section 38-201n(c) of the Connecticut General Statutes, the undersigned Peter W. Gillies, Insurance Commissioner of the State of Connecticut, has conducted a lengthy and complex investigation of the "claims made system" of insurance proposed to be introduced with policy form CG0011185 and CG0021185 filed by the Insurance Services Office Inc. (ISO) on December 5, 1984, and as amended to date. As a part of the investigation, public comment and information was sought at various meetings held in Connecticut as well as in the states of Massachussets, New York and Illinois; with representatives of ISO, the insurance agents association the insurance risk managers, as well as other state insurance regulators.

Based upon this investigation it is determined that ISO's policy form CG0021185 (Claims Made) fails to meet the statutorily imposed requirements of Section 38-370c of the Connecticut General Statutes as applied to professional policies in failing to include provisions for the purchase of prior acts and variable coverage on a contractual basis as required by Section 38-370c of the Connecticut General Statutes. Further, the failure to provide information relative to remaining insurance available to the insured at the time of purchase of an extended tail coverage results in the insured being denied basic information necessary to make an informed judgement.

The ability to charge up to 200% of the last annual premium for the purchase of tail coverage which may range from no insurance, because the aggregate limit has already been exceeded, or the full face value because there have been no claims assessed against the policy, places the insured in the untenable position of having to guess what insurance coverage will remain. Additionally, such a practice results in unfair discrimination, prohibited by Section 38-210c(a). It results in the ability of the insurer not only to charge different prices to different

insureds for the same product, but provides the insurer the ability to impose varying cost price differentials on different customers. When, as in Connecticut, the public's right to know is central to all consumer legislation, and insurance contracts are statutorily required to be written in clear language, this deficiency cannot be tolerated.

ISO's filing of the CGL form is the first revision of the Commercial General Liability policies since 1966. Prior to this time, ISO's CGL policies have been written on an "occurrence" basis (i.e. claims were covered if the event causing the loss "occurred" during the policy period, regardless of when the claim was made). The new Claims Made policy covers only those losses which arise for which claims are presented, during the policy period.

ISO and representatives of all the major insurers and reinsurers assert that the Claims Made Policy Form is necessary for reasons that relate primarily to accurate risk analysis and developments in the field of civil litigation. Their arguments may be briefly summarized as follows:

1. Litigation under the old "occurrence" policy has made underwriting of commercial liability risks difficult, if not in some cases, impossible. The continuing development of theories of civil liability make assessment of coverage requirements for future events impractical. Legal disputes and rulings relating to a determination of when an injury "occurs" have posed a recurring problem to the underwriter. This is particularly true when the injury itself is latent or results from long term exposure, or both. This lack of actuarial predictability impacts adversely upon the ability to accurately assess losses or to properly price for them.
2. ISO's current CGL coverage forms are extremely complex and burdened by numerous endorsements and riders designed to provide coverage generally

applicable to most insureds. To reduce costs and confusion, the current forms and manual rules need to be streamlined, clarified and made more understandable.

3. Because of the difficulty in underwriting the current CGL policy, reinsurers are increasingly opposed to sharing the risk of loss on such lines of coverage. Such coverage as is being provided, is being written by the reinsurer on a claims made basis. The reduction of reinsurance has had the immediate effect of reducing the direct writing insurers' ability to accept new risks, and necessitated substantial premium increases to maintain necessary reserves.

During the course of this Department's inquiry, many concerns have been raised regarding the effect which ISO's Claims Made Policy form would have on the market place. It is generally accepted that, at least as to the insurers, the originally proposed Claims-Made forms would have provided a temporary protection from the uncertainties described above. Nevertheless, approval by this office must be predicated upon a determination that the overall protection of the policyholder has not been adversely effected, and that there is, at the very least, a clear understanding by both parties as to the coverage being provided by the insurance policy.

Initially, ISO's policy form contained provisions which would have the following purposes or effects:

1. Retroactive date of policy (indicating date on which policy coverage attaches) could be unilaterally changed by the insurer at the time of renewal, or by a succeeding insurer, upon the issuance of a new policy.

2. Claims for losses had to be made within 60 days of the end of the policy period. The company could unilaterally offer to extend the claim reporting period for an additional 5 years with an additional charge of no more than 200% of the original premium.

3. The purchase of an extended claim reporting period would provide no additional insurance if the policyholder had exhausted his aggregate limit, there being no requirements for some minimum run off or tail coverage.

4. The insured was required to notify the company of any occurrence during the policy period which may give rise to a claim. The company could then, at its discretion, take no action, attempt to settle the potential claim, or cancel the coverage prior to a formal claim being made.

5. Upon renewal or replacement of a Claims Made policy with another company the insurer was able to advance the prior policies retroactive date and additionally issue exclusions for particular risks known or suspected to have occurred during the prior policy period, but for which no claim had been filed.

6. An insured whose Claims Made policy was cancelled for non-payment of premium had no right to purchase tail coverage regardless of the reason for the non-payment of premium.

The summarized terms would eliminate a commercial insured's ability to assure himself of full coverage, regardless of the price he was willing to pay. The insurers' ability to cancel, nonrenew, advance retroactive dates, refuse tail coverage, and issue lazer endorsements, all on a unilateral basis, would deny policyholders any reasonable expectation that a Claims-Made policy would ultimately provide the coverage sought.

ISO has consistently asserted that its members would not abuse their policyholders through arbitrary or un-

reasonable exercise of contract rights; and that the use of this policy forms would be generally limited to large commercial insureds with high losses and long indeterminate loss payout periods. It is argued that such consumers are knowledgeable and sophisticated enough to understand the nature and need for these proposed changes. Although this Department would hope that their assertions are accurate, they do not satisfy the insureds need to know the full extent and nature of the coverage being purchased.

The new Claims Made Form is filed for general use. If the ISO filing were approved it could be sold by a member company to any small business as well as the largest corporations in the State. Situations that can be foreseen which would necessitate an insurer taking actions adverse to the interests of the policyholder should be clearly set forth in the policy contract. Insurance contracts need not, and should not, leave policyholders at the mercy of their insurers' good will and unilateral judgement.

ISO, by its various amendments to form filing number GL 84-084CP, has made numerous changes in a good faith effort to eliminate problems disclosed by the current investigation. The most significant changes include the following:

1. An automatic extended tail coverage for claims made within five years of the policy period, and for which notice of occurrence was given during the period from the retroactive date to a date 60 days beyond the end of the policy period.
2. A mandatory offer to extended tail coverage for claims made within five years of the policy period regardless of when the policyholder provides notice of the occurrence.
3. An option (by the company) to increase the original amount of aggregate limit of liability applicable during the period of extended tail coverage.

4. Limitations on the carriers' right to advance a retroactive date only if:
   (a) there is a change in carrier;
   (b) there is a substantial change in the insured's operations causing an increased risk of loss;
   (c) the insured fails to provide the carrier with information which the insured should have known and which was material to the acceptance of the risk or was requested by the carrier; or
   (d) The insured requests such advancement.
5. Prior to the advance of any retroactive date, the insured must acknowledge in writing that all rights to purchase an extended tail have been explained.
6. The company's obligation to provide coverage is triggered when a claim is "received and recorded" either by the insured or the company.

With these and other changes ISO made significant progress toward eliminating the deficiencies of the original Claims Made filing. However, several key problems remain. Although ISO has indicated a willingness to continue working towards their elimination, policy form number CG0021185 cannot be approved until they are addressed.

Although the changes offered by ISO will allow most policyholders to elect extended tail coverage, the election would in all cases be exercised in the absence of any information needed to make the choice. Any policyholder with paid or outstanding claims, or notice of occurrences having arisen during the policy period, would have reason to believe some portion of his aggregate limit had been used up. He would not know how much remained, and in any event he would have no right to any addition to the

aggregate limit to cover unknown or unliquidated claims during the extended tail coverage period. The inability to obtain information relative to remaining coverage, and the absence of a contractual right to purchase a minimum aggregate limit, should such information dictate the need for it, places the insured in an untenable position. He neither knows how much coverage he has, nor does he have a contractual right to acquire such minimum coverage. Additionally, without this information, the insured would have no basis for pricing such tail coverage with other insurers if he sought less costly comparable coverage. The insurer on the other hand has such data available and will be entitled to charge 200% above the last premium for what may be nonexistent coverage.

Such results are, in and of themselves, a sufficient cause to disapprove the Claims Made Policy form.

The only way in which this deficiency can be corrected is by establishing a minimum aggregate limit of liability available during the extended tail coverage period and requiring that the company give each policyholder the following information:

1. All information on closed claims including the date and description of occurrence, and amount of payments, if any;

2. All information on open claims including date and description of occurrence, amount of payments and amount of reserves, if any; and

3. All information on notice of occurrence including date and description of occurrence and amount of reserves, if any.

Other significant deficiencies in the policy form remain to be addressed. The rights of policyholders to extended tail coverage if they are cancelled due to non-payment of premium have not been addressed. No justification exists for omitting such rights on the assumption that the

policyholder is less deserving. The optional purchase of tail coverage is itself dependent upon the payment of any premium charged and the company therefore would incur no unforeseen or uncompensated liability for providing such rights.

Although it is the understanding of this Department that a separate filing addressing the question of defense cost within aggregate limits is being considered, no changes have been made to eliminate the allocation of defense litigation costs to the policies aggregate liability limit. This handling of defense cost is contrary to general custom and practice and is unacceptable for several reasons. It places a burden on the insured to cover costs which he is powerless to control, and which may significantly reduce the aggregate limit of liability. The result would be that the insured may have less coverage remaining than he is aware of, or requires. Litigation defense costs have been traditionally borne by insurers because the defense activities benefit the insurer as much if not more than the insured. Insufficient justification has been presented which would warrant such a major change in insurance practice on this broad scale.

The undersigned is satisfied that the insurance industry has fairly demonstrated a need for a Claims Made form of insurance, specifically in long tail types of commercial coverage. However, the changes which are being required prior to approval of such a policy form within this State are essential if the interests of the public are to be protected. It is clear that the new form of coverage will require considerable effort on the part of both companies and their representatives to ensure that policyholders fully understand the coverage being provided. The inclusion of the requirements set forth above will eliminate unnecessary controversy.

IT IS THEREFORE ORDERED, on the basis of the foregoing, that policy form CG0021185 as filed and as amended to date, together with all endorsements, riders,

forms and manual rules regarding or related to such policy form, are hereby disapproved for use in this State.

YOU ARE FURTHER NOTIFIED THAT:

A. Nothing contained in this Order or Notice of Decision shall be considered or construed as a disapproval of policy form CG 0001-1185 filed and amended, including any endorsements, riders, forms or manual rules filed for use in connection only with such policy form; and

B. The disapproval of policy form CG0021185 and related materials is entered without prejudice to any subsequent refiling by the Insurance Services Office, Inc., or to the submission of any claims made policy form by individual insurers.

Dated at Hartford, Connecticut this 31st day of December, 1985.

/s/ Peter W. Gillies
PETER W. GILLIES
Commissioner

[STATE OF ILLINOIS, DEPARTMENT OF INSURANCE LETTERHEAD]

IN THE MATTER OF:
POLICY FORM FILING NO. GL84-084CP
OF INSURANCE SERVICES OFFICE, INC.
101 N. WACKER DR.
CHICAGO, ILLINOIS 60606

NOTICE OF DECISION

YOU ARE HEREBY NOTIFIED, that pursuant to Sections 143 and 402 of the Illinois Insurance Code (Ill. Rev. Stat. 1983, Ch. 73, pars. 755 and 1014) the undersigned John E. Washburn, Illinois Director of Insurance has conducted a lengthy and complex investigation of policy forms E600011185 and E600021185 filed by Insurance Services Office, Inc. ("ISO") under filing number GL84-084CP on March 7, 1984, as amended through October 28, 1985. As part of the investigation public comment and information was sought at open hearings held on August 28, 1985 in Chicago, Illinois.

Based upon the above-referenced investigation it is determined that ISO's policy form C60021185 ("Claims Made") does not meet the standards for approved use set out in Section 143(2) of the Illinois Insurance Code for the following reasons:

1. ISO's filing of the CGL form is the first wholesale revision of its Commercial General Liability ("CGL") policies since 1966. Prior to this time ISO's CGL policies have always been written on an "occurrence" basis (i.e. claims were covered if the event causing the loss "occurred" during the policy period, regardless of when the claim is made). ISO's new Claims-Made policy covers only those losses which arise during the policy period and for which claims are presented during the policy period.

2. ISO indicates that the Claims-Made policy form is needed for numerous reasons, many of which have substantial merit and relate to case law developments in the field of tort litigation, to wit:

   a. Litigation under the old "occurrences" policy has made realistic underwriting of commercial liability risks impossible. At the time this policy form is sold and priced neither the insurer nor the policyholder can be reasonably certain of the nature or extent of losses which may be determined as within the liability coverage 5, 10, 20 or more years into the future when theories of tort law may be changed.

   b. Legal disputes and rulings over the determination of when an injury "occurs" often cannot be foreseen when the injury itself is latent or results from long-term exposure or both. Thus, it is often impossible to project future losses when pricing an occurrence policy because of the inability to know what legal theories will be used in future years, and in the various jurisdictions, to determine the time of loss under a given policy.

   c. Numerous unforeseen legal theories have been adopted under which a series of events or exposures to risk have been held to have caused a loss which continued over a span of years and numerous "occurrence" policies; leaving many policies, and often several insurers, with an obligation to indemnify to the policy limit of each policy triggered by the continuous "occurrence". This stacking of coverage limits could not have been foreseen in the 1920's or 1930's. Even if it had been foreseen and policies could have been more accurately priced, such prices, taking into account economic inflation and inflation in the level of damage awards, would have been prohibitively high for policyholders.

   d. Under the old "occurrence" policy, many areas of coverage have been held to have only per-occurrence limits of liability and no aggregate limits. This combined with the uncertainties of inflation, tort legal theories, stacking and the fact that premiums are established at the policies inception without an ability to adjust for unforeseen future losses makes underwriting liability coverage extremely risky for the insurance company.

   e. ISO's current CGL coverage forms are extremely complex and burdened by the usage of numerous endorsements and riders needed to shape coverage to the extent which most policyholders desire. To reduce costs and confusion the current forms and manual rules need to be streamlined, clarified and made more understandable.

   f. Because of the difficulty in underwriting the current CGL policy with reasonable accuracy, reinsurers are increasingly opposed to sharing the risk of loss on such lines of coverage. This in turn reduces the direct writing insurer's ability to accept as many policyholders without obtaining large increases in reserves to offset the liabilities no longer accepted by reinsurers.

3. During the course of this investigation numerous concerns were raised regarding the effects which ISO's Claims-Made policy form would have on the market place. No one can dispute that the Claims-Made forms as originally proposed would have provided some temporary relief from the uncertainties suggested by ISO as justifying the new contract. Nevertheless, the standards to be applied under Section 143(2) of the Illinois Insurance Code require the Director to give substantial weight to the impact of a policy form on the intended purchasers.

Of particular significance in this case is the issue of whether or not the policy form "contains exceptions and conditions that will unreasonably or deceptively affect the risks that are purported to be assumed by the policy".

4. Initially, ISO's policy form contained provisions which would have the following purposes or effects:

   a. Retroactive date of policy (indicating date on which policy coverage attaches) could be unilaterally changed by the insurer upon renewal or by a succeeding insurer, if for any reason the policyholder changed carriers, upon the issuance of a new policy.

   b. Claims for losses had to be made within 60 days of the end of the policy period. The company could unilaterally offer to extend the claim reporting period indefinitely for an additional change of no more than 200% of the original premium.

   c. Acceptance of a company's offer of an extended claim reporting period would not have provided any minimum level of aggregate limits coverage. The original aggregate limit of coverage may have been exhausted by claims made before the extended claim reporting period was purchased.

   d. The insured was required to notify the company of any occurrence during the policy period which may give rise to a claim. The company could then, at its discretion, attempt to settle the potential claim, cancel the coverage before a formal written claim was made, or do nothing and hope that no claim was filed.

   e. Upon renewal or replacement of a Claims Made policy with another the insurer not only had the ability to advance the prior policies retroactive date but could also issue exclusions for particular risks known or suspected to have occurred during the prior policy period, but for which no claim had been filed.

   f. An insured whose Claims Made policy was cancelled for non-payment of premium had no right to purchase tail coverage regardless of the reason for the non-payment of premium.

5. Other policy provisions raised concerns regarding clarity and lack of specificity of intent, however those issues are of minor significance when compared to the major changes contained in ISO's initial filing of policy form CG00021185. The changes reflected in paragraph 4 above would totally eliminate a commercial insured's ability to assure himself of full coverage regardless of the price he is willing to pay. The insurers ability to exercise its contract rights to cancel, non-renew, advance retroactive dates, refuse tail coverage, and issue laser endorsements, all on a unilateral basis, would deny policyholders any reasonable expectation that a Claims Made policy purchased today would ultimately provide significant coverage for the risks contemplated.

6. Admittedly, ISO asserts that its members would not abuse their policyholders by the arbitrary or unreasonable exercise of contract rights; and that the use of this policy form would be limited to areas of the market which consists of large commercial insureds with high losses and long indeterminate loss payout periods. It is argued that such consumers are knowledgeable and sophisticated enough to understand the nature and need for these proposed changes. These assertions are hopefully accurate; nevertheless, they give the Director no basis for approving ISO's filing.

7. The new Claims Made form is filed for general use. If the ISO filing were approved it could be lawfully adopted by any ISO member company and sold to any corner grocer, shoe repair store or other small business as well as to the largest corporations in the State. It is also concluded that if ISO can foresee methods by which company contract rights can be reasonably and fairly exercised under the Claims Made form, then such methods can be translated into policy language which would preclude the potential for arbitrary or unreasonable action by insurers. Insurance contracts need not and should not leave policyholders at the mercy of their insurer's good will and unilateral judgment. As witnessed by current market conditions and questionable decisions by some carriers to cancel some risks, it is noted that insurance companies often base corporate decisions upon legal and economic circumstances beyond the control of individual insureds. In many cases the results can be devastating to both the long-term and short-term interests of policyholders. It is recognized that companies have a twofold obligation to treat policyholders fairly and reasonably while at the same time managing their insurance business efficiently so as to maintain adequate reserves and financial stability. While decisions made in fulfilling this latter obligation may be said to benefit policyholders generally it often causes extreme difficulty for individual insureds. Therefore when reviewing policy language it is of the greatest importance that the regulator be assured that all potential policyholders have the opportunity to know exactly what they are buying.

8. ISO, by its various amendments to form filing number GL 84-084CP, has made numerous changes in a good faith effort to eliminate problems disclosed by the current investigation. The most significant changes include alterations to the Claims Made policy as follows:

a. An automatic extended tail coverage for claims made within 5 years of the policy period, and for which notice of occurrence was given during the period from the retroactive date to a date 60 days beyond the end of the policy period.

b. A mandatory offer of an alternative extended tail coverage for claims or occurrences made or reported after the end of the policy period.

c. An option (by the company) to increase the original amount of aggregate limit of liability applicable during the period of extended tail coverage.

d. Limitations on the carrier's right to advance a retroactive date only if:

   i) there is a change in carrier;

   ii) there is a substantial change in the insured's operations causing an increased risk of loss;

   iii) the insured fails to provide the carrier with information which the insured should have known and which was material to the acceptance of the risk or which was requested by the carrier; or

   iv) the insured requests such advancement.

e. Prior to the advance of any retroactive date the insured must acknowledge in writing that all rights to purchase an extended tail have been explained.

f. The company's obligation to provide coverage is triggered when a claim is "received and recorded" either by the insured or the company.

9. With these and other changes ISO made significant progress towards eliminating the deficiencies of the original Claims Made filing. However, several key problems remain and although ISO has indicated a willingness to continue working towards their elimination, policy form number CG00021185 cannot be approved until they are addressed.

10. Although the changes offered by ISO will allow most policyholders to elect extended tail coverage, the election would in all cases be exercised in the absence of any information needed to make the choice. Any policyholder with paid or outstanding claims or notice of occurrences having arisen during the policy period would have reason to believe some portion of his aggregate limit had been used up. He would not know how much remained; and, if he did make a good guess, he would still have no right to any addition to the aggregate limit to cover unknown or unliquidated claims during the extended tail coverage period. The policyholder would thus be asked to decide whether or not he wished to pay up to 200% of his original premium for the extended tail coverage without knowing how much, if any, additional coverage he was actually buying. Nor would he have any basis for pricing such tail coverage or negotiating new policy coverages, exclusions and retroactive dates with either his current carrier or any other insurer in the market place. Such information is essential for a policyholder to be able to effectively market his risk in a competitive environment.

11. The only way in which this deficiency can be corrected is by establishing a minimum aggregate limit of liability available during the extended tail coverage period and requiring that the company give each policyholder the following information:

a. All information on closed claims including the date and description of occurrence, and amount of payments, if any;

b. All information on open claims including date and description of occurrence, amount of payments and amount of reserves, if any; and

c. All information on notices of occurrence including date and description of occurrence and amount of reserves, if any.

12. The absence of such contractual rights to a minimum additional aggregate liability and to receive information upon which the purchase of such additional coverage can be valued leaves the policyholder in a position of ignorance as to the value of the extended tail coverage he is being offered. Such results are in and of themselves a sufficient cause to disapprove the Claims Made policy form. The form's provisions assume that companies will act reasonably and charge minimum premium or no premium for the extended tail coverage, if the remaining available aggregate limits are diminished or exhausted. As indicated above such assumptions are not subject to direct proofs and in particular circumstances they have been shown to be incorrect because of concerns of insurance companies which are often adverse to the interests of individual policyholders. Even if the assumption of reasonable action by insurers could be proven, the policyholder would still be at a marketing disadvantage if he wished to consider switching carriers. Without the underwriting data on claims and reserves, policyholders would not be able to compare the advantages of the tail coverage offered with any offers of a new policy from other carriers.

13. Additional deficiencies exist in the policy form's treatment of cancelled policyholders. The rights of

policyholders to an extended tail coverage if they are cancelled due to non-payment of premium have not been addressed. No justification exists for omitting such rights on the assumption that the policyholder is less deserving. The optional purchase of tail coverage is itself dependent upon the payment of the premium charged and the company therefore would incur no unforeseen or uncompensated liability for providing such rights.

IT IS THEREFORE ORDERED, on the basis of the foregoing, that policy form filing number GL84-084CP filed on March 17, 1985, as amended through October 28, 1985, together with all endorsements, riders, forms and manual rules regarding or related to such policy form filing, are hereby disapproved for use in this State.

YOU ARE FURTHER NOTIFIED that:

A. This Order and Notice of Decision shall be considered and construed as a disapproval of policy form CG00011185 as well as policy form CG00021185. Although the "occurrence" format of policy form CG00011185 is generally acceptable, it was filed with the Claims Made policy form and the manual rules and endorsements used on each policy assume the existence of both forms and the policies must therefore be considered jointly.

B. The disapproval of policy form filing number GL84-084CP is entered without prejudice to any subsequent refiling by the Insurance Services Office, Inc., or to the submission of any occurrence or claims made policy form by individual insurers. Any such refiling or filings shall be considered independently under the applicable insurance laws.

IN WITNESS WHEREOF, I have hereunto affixed the Official Seal of the Department of Insurance in the

City of Springfield, State of Illinois, this 30th day of December A.D., 1985.

s/ John E. Washburn
JOHN E. WASHBURN
Director of Insurance

[STATE OF ILLINOIS,
DEPARTMENT OF INSURANCE LETTERHEAD]

January 27, 1986

Daniel J. McNamara
President
Insurance Services Office, Inc.
175 Water Street
New York, New York 10038

Dear Mr. McNamara:

As you are aware, policy form filing number GL84-084CP filed on March 7, 1984, as amended through October 28, 1985, was disapproved by this office on December 30, 1985. That disapproval was issued primarily because of three deficiencies in policy form CG00021185 (the "Claims Made policy"), inter alia:

1. The Claims Made policy did not give the insured a right to purchase supplemental extended reporting period coverage ("tail" coverage) if the policy were cancelled for non-payment of premium;

2. The provisions of the Claims Made policy did not assure that if the supplemental tail coverage were purchased, the insured would actually receive any additional coverage, since his policy's aggregate limit of liability may have already been obligated; and

3. The Claims Made policy did not entitle the insured to receive the loss information he would need to obtain competitive quotes or to determine the need for purchasing supplemental tail coverage.

These deficiencies were found to be reasonable grounds for disapproving the policy form filing because of their impact on insureds. Without the correction of these deficiencies a policyholder could expect to incur gaps in coverage and would be forced to make purchases of supplemental and replacement coverages without knowing what he was buying, whether it would meet his needs or whether the price was reasonable.

On January 16, 1986, policy form filing GL84-084CP was refiled with amendments which correct the foregoing deficiencies in policy form CG00021185. Insureds who are cancelled or nonrenewed for *any* reason are given the right to purchase supplemental tail coverage. When supplemental tail coverage is purchased insureds are guaranteed reinstatement of 100% of the aggregate limit of liability under the policy for all claims reported after the end of the policy period such that purchasers know exactly what their payment of additional premium will provide them. Finally, there is a right of the policyholder to obtain such loss information on claims and occurrences as may be necessary to obtain replacement coverage should he change insurance companies for any reason.

Under the new Claims Made policy insureds will be entitled to receive loss information in whatever form the market place requires. If insurers require aggregate loss data to quote a risk previously writen on a Claims Made policy, then the insured will be entitled to the data in that form from the existing carrier. If insurers require loss data itemized by specific claims and occurrences, then insureds will be given the data in that form.

With the current amendments companies obtain the ability to assure themselves of a limit to their liability and to charge a premium payment which more accurately reflects the loss experience of a given risk. In exchange, insureds obtain the ability to make rational choices in the purchase of liability insurance. Every claims made policyholder will have the information necessary to determine, and the right to determine whether he needs supplemental tail coverage, higher aggregate limits of liability, or whether he can get adequate coverage elsewhere at a better price.

This new policy form filing presents a new approach at a time when the market place is in desperate need of a tool to break the intolerable boom and bust cycle which has dominated liability markets for decades. Companies will gain from the greater certainty which this policy brings. At the same time, liability insurance purchases will no longer be simple "take it or leave it" propositions because of the unprecedented access to loss information on claims and occurrences. For these reasons policy form filing no. GL84-084CP is hereby approved as filed and amended January 16, 1986.

Very truly yours,

JOHN E. WASHBURN
Director of Insurance

JEW:mal

CC: Richard Rogers

[EXHIBIT R]

[INSURANCE SERVICES OFFICE, INC. LETTERHEAD]

June 18, 1986

LETTER TO CHIEF EXECUTIVES

Gentlemen:

Advisory Excess and Umbrella Language For Use With The CGL Policy

The introduction of ISO's revised Commercial General Liability (CGL) Program—particularly the "claims-made" form—has placed substantive demands on the excess and umbrella markets to develop compatible forms for higher layers of coverage. The industry-wide controversy surrounding the CGL Program, while now beginning to abate, spawned confusion and uncertainty as necessary modifications were introduced to accommodate the needs and concerns of all interests. Clearly, no single approach or policy form can serve the diverse, independent, and worldwide marketplace in providing excess and umbrella coverage over an underlying program that is itself inherently flexible.

Nevertheless, ISO staff has developed—*without insurer committee participation*—umbrella policy language which can be adapted in various ways to fit over primary insurance written on ISO's 1986 Commercial General Liability policy forms. We are providing our advisory policy language to you for your information and possible use, along with an explanation of various provisions and how they can be assembled. Of course, the application of a company's own independent underwriting and legal judgment is essential to the proper use of this material.

The alternative provisions can be combined into a policy providing "excess liability" coverage only, "extended liability" coverage only, or "umbrella" coverage which is a combination of both. The "excess liability" coverage utilizes a "follow form" approach over scheduled underlying

insurance. These provisions can be used with either the "claims-made" or occurrence versions of the CGL policy. The "extended liability" coverage applies to exposures not ordinarily covered by underlying policies or specifically excluded in them. Coverage for these exposures is on a "claims-made" basis. An umbrella policy is formed by using both the excess and extended liability coverages.

To further enhance policy flexibility, certain provisions have been drafted in more than one version, and several endorsements are also included. *Beyond this unique distribution in response to unprecedented circumstances, ISO will maintain its traditional role of non-involvement in the excess-umbrella field.* ISO does not recommend that insurers assemble this language into any particular policy form, and each insurer must carefully analyze coverage and policy language on a risk-by-risk basis. Furthermore, ISO's providing this language is not meant to suggest that other language could not be more appropriate for some or all risks. ISO does *not* intend to file or advocate the enclosed policy language with any insurance department, nor to support it with statistical, rating, rules, or other services.

Copies of your advisory material are being sent simultaneously to other key domestic and international industry interests, also for the same informational purposes.

Sincerely

/s/ Daniel J. McNamara
DANIEL J. MCNAMARA
President

cc: ISO Board of Directors
ISO Commercial Lines Committee
ISO General Liability Committee

[EXHIBIT S]

[STATE OF ILLINOIS,
DEPARTMENT OF INSURANCE LETTERHEAD]

February 28, 1985

Insurance Service Office
101 North Wacker Drive
Chicago, Illinois 60606

Attention: Mr. Roger Steinback
Regional Manager

Dear Mr. Steinback:

Pursuant to our recent telephone conversation regarding the recent amendments to the Commercial General Liability Policy Program, the following is a brief summary of some of our concerns regarding this program.

1. Education. Concepts so divergent as to impact the entire marketplace, and each and every individual insured, should be accompanied by education in order to achieve acceptability. Certainly, an effective date aimed at January of 1986 is questionable to allow sufficient time as to accomplish a comprehensive educational program, comprehensive enough to educate individual consumers in order for them to make a reasonable decision with regards to the best product to suit their situation. What steps, if any, has ISO and the insurance industry taken to educate the industry personnel, sales force and consumers on the concepts and differences in products they will now be offering, in order for the insured to make a reasonable decision regarding their specific needs?

2. The new occurrence policy form, as well as the new claims made policy form, now propose an aggregate limit to the various coverage sections. While aggregate limits are not a new concept in insurance contracts, it will certainly be a new concept to a majority of insureds who now have set liability limits

applicable to each and every covered occurrence. Presently, aggregate limits are generally confined to very large commercial risks and professional liability type policies and the aggregate limit is reduced during the policy term by a proportionate amount of the claims paid during such policy period. Since this concept will be new to the majority of general liability insureds, we feel the following questions should be addressed:

A. What steps, if any, have been taken or are proposed to be taken, by ISO and the insurance industry to keep the insured informed of his liability limit as claims are paid and the aggregate limit decreases?

B. As claims are paid and the aggregate policy limit decreases, will the insured be able to repurchase new limits or increase his/her limits during the policy period?

C. Will the Excess and Umbrella policy forms be changed accordingly? Presently, Excess and Umbrella policy forms require not only that the insured obtain primary coverage of certain limits but also require that the insured maintain such primary coverage limits during the term of the policy. Unless the Excess and Umbrella policies are changed accordingly, it is conceivable that there may be gaps or voidance of coverage.

3. Notification of an event that may result in a claim. Under the Conditions Section of the claims made policy, the insured is required to notify the insurer or an occurrence which may give rise to claim being made under the policy. The triggering mechanism for coverage, however, is written notice to the insured or the insurance company of such claim from the person or organization seeking damages, providing such written notice is furnished during the policy period.

A. If the triggering mechanism for coverage is written notice to the insured, why is there a need under the conditions section for the insured to notify the insurer of an occurrence which may give rise to a claim being made under the policy?

B. If an insured notifies the insurer of an occurrence which may give rise to a substantial claim, what prevents the insurer from cancelling or non-renewing the policy in an attempt to avoid a claim under the policy? Granted the insured can purchase extended discovery period coverage at a maximum premium of 200% of the final annual premium, but he or she also faces obtaining a new policy at current manual rates and rating plans.

C. If an insurer is notified of an occurrence which may result in a claim, and does absolutely nothing to investigate and resolve, the potential for claim would seem contrary to the Improper Claims Practices Act of Illinois and other jurisdictions.

D. If the insurer intends to use the mechanism to investigate and settle certain claims and wait for the trigger mechanism on other claims, this certainly reeks of unfair discrimination in claims handling.

4. Under Section IV., this insurance is excess over any other insurance including excess. Excess policies generally contain similar wording in their Other Insurance Clauses. How do you propose this conflicting wording be resolved without legal action being taken by the insured to resolve?

5. On the claims made policy, the medical payments coverage is written on an occurrence basis. Why?

6. Under the Extended Reporting Period Option, only the first named insured may exercise the option. We feel any named insured should be able to exercise this option.

7. The cancellation provision conflicts with Illinois Statutes which requires written notice of cancellation to the named insured, not the first named insured.

8. With the revision to the Extended Reporting Period Option, shouldn't Endorsement GL 2701 11/85, which limits the availability of the extended reporting option to retirement, out of business and cancellation by the company, be withdrawn since it conflicts with the revision.

The above illustrates only some of our concerns that we would like to discuss and should not be construed as being all encompassing.

Please feel free to contact me to arange a meeting to discuss this matter.

Very truly yours,

/s/ Robert F. Heisler
ROBERT F. HEISLER
Assistant Deputy Director

RFH:mbc

[STATE OF NEBRASKA,
DEPARTMENT OF INSURANCE LETTERHEAD]

Rudy D. Broyles
Regional Manager
Insurance Services Office, Inc.
12 South 6th Street
Minneapolis, MN 55402

RE: GL 84-084CP CGL Policies

Dear Mr. Broyles:

We have analyzed the aforementioned filing and have the following comments/questions:

1. Although we are aware that you wish to file the forms first and the rates later, we are very concerned as to how the rates will be generated for the claims made policy. Given the nature of the claims made policy, it is difficult to analyze the form without the accompanying rates when the rates are such a crucial part of the claims made format.

2. With regard to the sudden and accidental polution exclusion in (Section I 1a and 1b on Coverage A), the change in the sudden and accidental polution exclusion would seem to be a significant reduction in coverage relative to the old form. Would you please comment on this reduction and whether or not it will promote gaps in coverage?

3. Under Coverage B, Personal and Advertising Injury, these coverages are apparently on an occurrence basis while contained within a claims made form. It has been Nebraska's policy that claims made and occurrence not be written in the same form or package because of the resulting confusion in coverage and potential gaps in coverage.

4. With regard to the "notice of occurrence which is not notice of claim", we are concerned that there could be gaps in coverage if oral and/or written notice of a potential claim is made during the policy period and/or written notice is given but no claim is made until the succeeding policy period. Given the typical application on a claims made whereby claims resulting from known prior acts and/or knowledge is excluded or the policy is not even issued, the insured could be left with no coverage.

5. Before we can proceed, we do need the charge for the extended reporting period. Since this is a claims made policy, if the insured does not know the cost of the extended reporting period, all the insurer has to do is to charge an exorbant rate. Since obviously the problem exposures will be the ones that wish to have an extended period, the insured could be left with no tail coverage.

5. Could you please file the application since it would be such an intergal part of this type of coverage?

6. Could you please further explain the exclusion under Property Damage (Item J on page 2 of 9)? Since it appears to go much farther than the standard property damage exclusion of care, custody and control? Could you also further clarify the intent of the following paragraph: ("paragraph (2) of this exclusion. . . held for rental by you") which follows j.(6).

7. Given the common general usage of a CGL occurrence policy, do you anticipate any problems with the availability of excess umbrella, etc. coverage? All of the excess programs above this level have been occurrence because of the fact that claims made underlying policies have never been used in this area. Given the two different coverages and

the differences in the manner in which coverage is triggered, we are concerned about both the availability of umbrella, excess, etc. coverage, and also the concurrency of the coverage.

8. We do have serious concerns with respect to the use of claims-made policies by non-speciality and small to medium sized insureds who do not have the expertise and experience with the claims-made policies. The above scenario coupled with the relative non-specialized insurance knowledge of the typical general liability insured could cause a large amount of confusion resulting in misunderstandings and gaps in coverage. Could you please elaborate on the proposed educational programs involved at the insurer, agent, and insured levels? Also will the claims-made policy be significantly marked or indicated such so the insured clearly realizes the product he has purchased is not the occurrence policy he is used to? What procedure will be used upon cancellation, nonrenewal, etc., to notify the insured that an extended period is available and procedures (including that time limitation, etc.) to obtain that option?

Further action on this filing will await your reply.

Very truly yours,

/s/ Daniel E. Eckstein
DANIEL E. ECKSTEIN
Property/Casualty Analyst

DEE:jr

[STATE OF NEW YORK INSURANCE DEPARTMENT LETTERHEAD]

October 11, 1985

NEW YORK STATE INSURANCE DEPARTMENT OPINION AND DECISION ON SIGNIFICANT ISSUES RAISED BY INSURANCE SERVICES OFFICE, INC. FILING ON COMMERCIAL GENERAL LIABILITY CLAIMS-MADE POLICY FORM

The Insurance Services Office Inc. (ISO) filed a revised Commercial General Liability (CGL) Program with the New York State Insurance Department (Department) on March 13, 1984, with subsequent amendments to such Program filed on December 5, 1984 and February 14, 1985. The CGL filing represents the first major revision for this product since 1966. The filing attempts to accomplish three major objectives:

(1) Consolidation, streamlining, and simplification of the existing CGL policy;

(2) Elimination of some areas of uncertainty under current occurrence forms brought about by adverse court decisions in several jurisdictions;

(3) Virtual elimination of coverage for an arguably uninsurable exposure, namely, pollution.

ISO has also filed numerous endorsements to complement the CGL policy forms. ISO filing GL-84-084CP consists of a revised CGL policy in two versions. The two versions differ only with respect to their coverage trigger and related provisions. The occurrence version, GL0001, provides bodily injury and property damage liability coverage for injury or damage that occurs during the policy period. The "claims-made" version, GL0002, provides bodily injury and property damage liability coverage only when a claim for damages is made during the policy period.

This filing has evoked much controversy in the commercial liability insurance marketplace, with three principal areas of controversy dominating the debate on the revised CGL policy forms. These are:

(1) A substitution of a claims-made approach for an occurrence as the trigger of coverage under the policy;

(2) An aggregate annual limit of coverage for all coverages under the policy; and

(3) An exclusion of coverage for sudden and accidental pollution.

The above changes are deemed by ISO and several major insurers and reinsurers to be absolutely essential to the reestablishment and maintenance of healthy primary and reinsurance markets for general liability insurance. ISO has also stated that if state regulators tie insurers' hands by not approving the above coverage changes, some insurers will withdraw from the marketplace or become insolvent, while others may have to curtail their operations in the general liability line of insurance. Purchasers of CGL insurance such as the Risk and Insurance Management Society, insurance producers, and various consumer representatives have expressed great concern over the proposed changes, contending that such changes will result in misunderstanding on the part of insureds, gaps in coverage, and an abrogation by the insurance industry of its traditional role of reducing uncertainty for insureds.

In view of the extreme importance of this filing, the Department has solicited the views of all parties concerned with the commercial liability insurance product. The filing was the subject of a Public Hearing held at the Department on May 16, 1985 and many meetings with ISO and other concerned parties. A Joint Forum on the filing, sponsored by the Illinois, New York and Texas Insurance Departments, took place on July 25, 1985 in Chicago, Illinois.

This opinion and decision will concern the three controversial elements of ISO's CGL filing. While the Department is still reviewing some of the numerous other revisions being proposed in the CGL form, on the whole, ISO is to be complimented on its effort to consolidate, streamline and simplify the existing CGL form.

OPINION AND DECISION

A need does exist to reduce an insurer's potential exposure caused by adverse and often contradictory court decisions, to enable insurers to better predict their potential loss exposure in order that the pricing of their product may be based on reasonable loss expectations. All three of the above significant changes would result in more certainty in the pricing of commercial liability insurance. The Department is of the opinion that approval of the aggregate annual limit and the pollution exclusion will substantially and sufficiently ameliorate the predictability problems insurers are currently confronting.

The Department does not agree that the claims-made policy form offers a long-term solution to uncertainty problems caused by adverse and/or contradictory court decisions and is of the opinion that such form should only be utilized on risks involving long-tail or latent injury exposures where there is a determined availability problem. Claims-made coverage, as will be demonstrated below, is generally inferior to occurrence coverage and in our opinion, the widespread use of the claims-made policy is inappropriate and unnecessary on most exposures. ISO and several major insurers have agreed that a problem exists on only about 5% of the CGL policies written. A better effort should be made by industry to both isolate such problem exposures and draft policy language that restricts coverage to the contemplated exposure.

The Department has, for many years, approved claims-made policy forms for the following exposures:

—Professional Liability, including (since 1981) Medical Malpractice
—Errors and Omissions
—Employee Benefit Liability
—Product Liability
—Completed Operations
—Pollution Liability
—Environmental Impairment

All of the above have either long-tail or latent injury characteristics. Additional exposures may be added to the above list by the Department upon a demonstration of need by any interested party.

All claims-made policy forms previously approved or to be approved in the future will be required to meet specified minimum standards, as set forth in a regulation to be promulgated by the Department. Such minimum standards should include:

(1) An extended claim reporting period (tail) of unlimited duration must be offered for sixty days subsequent to the cancellation of the policy at a premium not to exceed 200% of the current mature claims-made liability policy annual premium. This provision shall also apply to cancellations for non-payment of premium, if a claims-made policy has been in effect for one year or longer.

(2) A free sixty day extended reporting period (tail) shall be provided upon cancellation of the policy by either the insured or insurer at no additional charge at that time.

(3) If a claims-made policy has been in effect for more than two years, tail coverage must be made available at limits equal to at least 100% of the highest aggregate annual limit previously purchased during any claims-made policy period. Thus, the tail coverage may not be limited to the

remaining coverage available during an insured's last policy year.

(4) Endorsements restricting the availability of tail coverage are prohibited. Included as a part of ISO's filing are so called "Laser" endorsements which limit the tail guarantee of the claims-made forms. ISO has agreed to withdraw these Laser endorsements.

(5) Upon termination of a claims-made policy, the insurer must advise the insured of the availability of and premium for tail coverage, and the importance of purchasing tail coverage. In order to make certain that this notice has been received, the terminating insurer should be required to obtain a written rejection of tail coverage from the insured when such coverage is not purchased. If such rejection is not received, the insurer should issue a tail policy to such insured. Non-payment of the premium for such tail policy, resulting in cancellation by the insurer, will be presumptive proof of the insured's rejection of the tail. An alternative to the above procedure would be to place the obligation for obtaining proof of either purchase or rejection of tail coverage on the new insurer. If such proof is not received the new insurer would be responsible for nose coverage back to the original claims-made policy effective date.

(6) An insured must receive at least sixty days notice from the insurer of the cancellation or non-renewal of a claims-made policy other than for non-payment of premium.

(7) The annual premium during the first few years of a claims-made policy should not exceed the applicable occurrence rate for such risk.

(8) An insurer should not be permitted to unilaterally move up an insured's retroactive date (nose coverage) as a condition of policy renewal. An insured may consent to moving up such date in consideration of an appropriate premium saving.

(9) An insured should not be required to report any incident which may result in a claim for which claim such insured might not be covered under the policy. A claim shall be deemed made under the policy if written notice of the claim is received by the insured or insurer from a claimant, or the insured submits written notice to an insurer of an incident which might be expected to be the basis of a claim within the policy period.

(10) The policy application and the initial page of each claims-made policy must have printed thereon in bold face type a notice that the policy is written on a claims-made basis.

(11) An insurer must obtain a signed statement from each new claims-made insured on which the insured acknowledges having been informed of the limited scope of coverage provided by the claims-made form.

The above suggested minimum requirements for a claims-made policy are intended to respond to the serious concerns that the Department has regarding the expanded use of the claims-made form. For the reasons contained in this opinion, the Department hereby disapproves the claims-made version of the revised ISO CGL policy, form number GL0002 and related endorsements. After the Department's Regulation for claims-made policies is in place, claims-made filings may be made on exposures with determined availability problems caused by long-tail or latent injury concerns. The Department will approve the two other controversial parts of ISO's filing, namely, the annual aggregate limit and the pollution exclusion.

JUSTIFICATION PRESENTED BY ISO FOR APPROVAL OF THE CGL POLICY

The CGL filing represents the first major revision for this line of insurance since 1966. The filing has several objectives which are best summarized by setting forth ISO's own stated reasons for the change:

(1) Litigation relating to the existing "occurrence" policy has been costly and time-consuming. For the most part such litigation—which continues to go on to the detriment of insurers and policyholders—has centered on latent bodily injury and long-term exposure issues involving substances such as asbestos and DES. A key issue in dispute is: When did the injury or damage occur? That is extremely important in the context of insurance because the answer determines which "occurrence" policy or policies apply. Litigation over that question is likely to affect more and more insureds of all sizes in all types of business, as new cases arise where the time when bodily injury or property damage occurred is at issue.

(2) Many insureds have to rely on policy limits provided by old "occurrence" policies to respond to current claims, because the injury or damage may have occurred long before the claim is made. Those old policies may have been purchased many, many years before claims emerge, settlements are reached and judgments rendered—and years before inflation eroded the value of the old policies' limits.

(3) Some courts have adopted legal theories in latent-injury or long-term exposure cases, which hold that injury occurred during a long series of "occurrence" policies. That leaves many contracts—and sometimes many insurers—with primary defense and indemnity obligations for a

single claim. Often, such situations arise when there are many claims for similar or related injury. As a result, insurers don't know how much is at stake, and for how long, under these contracts. That makes it difficult to determine accurate premiums and loss reserves. And beyond that, such "stacking" of limits poses a serious threat to the very solvency of some insurers. In view of this, some insurers and reinsurers have become increasingly reluctant to handle "occurrence" coverage. Without some change, there could be a real insurance-availability problem.

(4) Under the existing policy form, the only limit that applies to some parts of the coverage is a per-occurrence limit, so the insurer's liability for injury that occurs during the policy period increases with the number of "occurrences" held to have produced the injury. That liability could be astronomical, depending on how courts interpret the term "occurrence." "Stacking" per-occurrence limits within a single policy further threatens insurance availability and insurer solvency. For example, the drinking of contaminated water over a ten year period could be interpreted as 365 occurrences during a policy year with 365 separate occurrence limits applicable to any claim for injury as a result of such contamination. (The existing policy form does, however, put aggregate limits on many parts of the coverage, including products and completed operations.)

(5) Some courts—after long and costly lawsuits—have interpreted the "sudden and accidental" exception in the existing policy form pollution exclusion so broadly that insurers and reinsurers are exposed to unknown but potentially gigantic losses totally unforeseen when existing policies

were written or priced. Moreover, pollution coverage is particularly vulnerable to all the "occurrence" issues arising under the existing policy form, because pollution-related damage or injury is often latent, there can be many causes of the injury, and there may be no aggregate limits on the coverage.

(6) Need exists to consolidate and modernize ISO's advisory commercial general liability policy forms. Today many forms are needed to provide the scope of coverage that most buyers consider standard.

(7) To improve efficiency and reduce costs, the existing policy forms, manual rules and rating procedures need to be streamlined and made more adaptable to automated policywriting.

(8) Insurance buyers and regulators want more readable and understandable insurance contracts for all lines of insurance.

ISO and various major property and casualty insurers have also stated that immediate approval of the revised form is necessary to alleviate the capacity crunch that now exists in the insurance marketplace. ISO has further represented that utilization of the claims-made form, coupled with an aggregate annual limit and the pollution exclusion, will increase the availability of general liability insurance and will ease insurers' acquisition of required reinsurance.

In the Department's opinion, this decision will meet most if not all of the objectives cited by ISO without the need for the widespread use of the claims-made CGL policy. The exclusion for pollution coverage in the CGL occurrence policy and the availability of claims-made forms for products liability, completed operations, environmental liability and pollution liability will serve to reduce litigation involving latent bodily injury and long term exposure issues involving such substances as asbes-

tos and DES. Most litigation that has extended liability beyond what insurers expected has involved either products or pollution exposures. ISO objectives one and five above appear to be satisfied by the Department's decision. The approval of the annual aggregate limit as a part of the ISO CGL occurrence policy appears to mitigate the concerns raised by ISO objectives three and four above. Objectives six, seven and eight will be met by the approval of ISO's CGL occurrence form. The widespread use of claims-made forms would assist in better meeting objective two, although such form would not wholly solve the problem.

Since the tail of a terminated claims-made policy is restricted to the coverage limits contained in the last year of such policy, any claims that are made several years after such termination would suffer from the eroded value of the tail's limits.

JUSTIFICATION FOR DEPARTMENT'S OPINION AND DECISION

The Department's decision requires a determination as to whether the approval of ISO's revised CGL claims-made policy meets the statutory requirements contained in Section 2307(b) of the Insurance Law. The Department is of the opinion that the claims-made policy form does not meet these requirements in that (a) it would be misleading to insureds and the public, and (b) its widespread use in the standard CGL policy form would be violative of public policy. The virtual exclusion of coverage for pollution losses and the aggregate annual limit, both of which represent severe restrictions of coverage, are not misleading provisions and appear to be necessary to maintain a viable general liability insurance market in New York. The detailed analysis of the reasons for the above decision follows:

Claims-Made Policy Form

Insurers, reinsurers and ISO have testified that the claims-made policy form is not an inferior product when compared to the occurrence form. They cite as benefits to insureds such intangibles as greater availability of coverage and the very solvency of insurers. Also, they state that the claims-made form will facilitate more up-to-date coverage on risks with long tail or latent injury exposures. Finally, insurers argue that insureds receive an initial price reduction with the claims-made form since the purchase of coverage for Incurred But Not Reported (IBNR) claims is deferred to the future.

Since the claims-made premium in a few years equals the occurrence premium, with a possible 200% additional premium needed to buy out of the contract at the end of this period, savings to insureds are temporary and somewhat illusory. Like the popular adage, "Pay me now or pay me later", under claims-made the initial savings are paid for several years down the road at inflated dollar rates. Insureds with latent injury or long-tail exposures, such as products and environmental liability, will be able to purchase a separate claims-made form to cover these exposures. Thus, the objective that claims-made forms provide more current coverage for latent injury claims can be satisfied without having a CGL form on a claims-made basis.

It is clear from the testimony at the public hearing previously referred to that the claims-made form is less readily understood by insureds and the public, and that the likelihood of coverage gaps is much greater under this form. An insured will have less flexibility of movement to another insurer, and an insured with newly discovered claim hazards will face possible bankruptcy as such insured's current insurer will undoubtedly cancel the contract, leaving the insured with inadequate tail coverage to provide for many years of earlier exposure to the newly discovered hazard.

From the perspective of insurers and reinsurers the claims-made policy is clearly a superior product to the occurrence form. Insurers gain greater underwriting control, more certainly in predicting glosses and greater control over insureds due to less flexibility of movement of insureds to another insurer. ISO argues in its publication "ISO Makes the Case for the CGL", that "an overwhelming majority of insurers view their own interests to be in the establishment of an orderly, reliable market for claims-made coverage and will act accordingly". The reliability of this statement is severely tested by the current behavior of insurers in the commercial liability insurance marketplace where, regardless of the underlying policy form (occurrence or claims-made), insurers have been terminating entire lines of business, imposing massive rate increases or placing severe limitations on coverage as a condition of renewal. ISO's often repeated statement that insurers will use the claims-made form in a responsible, orderly manner appears to be out of step with reality.

The Department's regulatory responsibility in determining the acceptance of any new insurance product must clearly reflect the effects such policy has on the purchasers of insurance and the public. We cannot be distracted from this responsibility by threats of industry withdrawal if regulators do not act in the manner requested by industry. If the gloomy forecasts of insurers, reinsurers and ISO come to pass, such problems can be resolved by State action to create alternative markets.

A comparison of the claims-made form with the occurrence form requires the conclusion that the claims-made form is clearly an inferior insurance product from the standpoint of the insured and potential third party claimants. Proponents of the claims-made form state that such form eliminates some uncertainty in writing CGL business, thereby increasing the willingness of insurers and reinsurers to write new business. The uncertainty does not really disappear, however, as the risk is merely transferred from insurers to insureds and the public.

The Department has carefully considered the potential benefits to insurers, reinsurers and producers against the potential costs of the new policy form to insureds and the public. The result of this cost/benefit analysis is a finding that the costs to insureds and the public far outweigh the short-term benefits the claims-made policy provides to the insurance industry. We believe that the elimination of pollution coverage from the standard CGL policy and the new aggregate annual limit of coverage under the policy will eliminate much of the uncertainty caused by recent adverse court decisions. These changes, coupled with a restoration of proper pricing of insurance products in the marketplace (which may be the real cause of most of the industry's problems in insuring liability coverages), should restore sufficient availability for needed insurance products. An effort should be made by all parties at interest to provide a workable definition of occurrence that will reflect the exposure contemplated for the premium charged. The Department stands ready to assist the industry in drafting policy language or legislation that will rationalize inconsistent court decisions.

The following are the principal bases for the Department's disapproval of the general use of ISO's claims-made CGL policy form:

(1) The problems which the claims-made approach is intended to cure are present in only about 5% or less of CGL risks. Instead of imposing claims-made policies on all insureds, regardless of the nature of the risks to which they are exposed, a better approach would be to identify these problem exposures and permit a claims-made approach for them. As mentioned above, the Department has approved claims-made forms for many long-tail and latent injury exposures.

(2) The claims-made policy, in return for an initial reduction in premium, reduces coverage under the CGL policy to claims-made during the policy period as opposed to coverage for all occurrences during the policy period regardless of when the claim is made. The claims-made form is inherently different from any form of insurance coverage the insured is likely to be familiar with, and the insured's perception of the coverage is, therefore, likely to be colored by such previous experience. Thus, the reduction in coverage will not be readily apparent to insureds, and gaps in coverage are likely. Some insureds will fail to purchase adequate tail coverage and will be confused over the need to coordinate the retroactive date (nose coverage) to the initial date of claims-made coverage. Many insureds will be under the impression that they have received another bargain from their insurer as has been the case in recent years of cashflow underwriting.

(3) Under the claims-made form, insurers are transferring uncertainty and risk from themselves to insureds, to the detriment of both insureds and the public. Insurers are in the risk business. As the sellers of certainty and reduction of risk, their advocacy of the claims-made form appears to be contradictory to the very purpose of their existence. As risk insurance managers testified at the Department's September hearing, insurance purchasers would pay a higher price for a product that covers their needs rather than be forced to buy an inferior product. It is apparent from the plans of several insurers that, should the form be approved, only claims-made CGL policies will be available in the marketplace. Reinsurers will pressure other insurers to write underlying coverages on a claims-made basis if such an option is available. This refutes ISO's representation that the claims-made CGL form will be merely a companion product to the

occurrence form in the marketplace. Approval of a claims-made CGL form may be the precursor of claims-made Business Auto Policies (BAP) and Business Owner's Policies (BOP).

(4) Although proponents contend that the claims-made approach will reduce costly litigation, that contention seems suspect. First, the term "occurrence" would continue to be used in the claims-made form. Yet it would seem both desirable and doable to replace or redefine the term "occurrence" contractually and, if necessary, legislatively. Moreover, given the difficulties producers would face in attempting to explain the complexities of the claims-made policy to insureds, the coverage litigation that insurers are currently experiencing might simply shift to a proliferation of errors and omissions lawsuits against producers.

(5) Although insurers urge that the occurrence policy approach be totally discarded for commercial coverages, the stacking dilemma they confront might be more effectively addressed by an appropriate coordination of benefits strategy.

(6) Two other critical issues are (a) whether, when occurrence and claims-made approaches are compared, the reduction in premiums will be commensurate with the reduction in coverage, and (b) how premiums will step up as claims-made policies age. Criteria must be developed to ensure proportionality between premiums and protection.

(7) Adding tail (or nose) coverage on a claims-made policy raises many issues, such as whether commercial insureds (upon retirement, bankruptcy or insurer changeover) will have sufficient ability, incentive, or wherewithal to purchase it. On the one hand, the possibilities of collusion and

adverse selection appear to be accentuated to the detriment of insurers; on the other hand, insurers will be inclined to carve out known exposures from tail coverage through Lazer endorsements, or otherwise, to the great detriment of insureds. ISO has filed endorsements that will permit insurers to eliminate coverages for known occurrences which will result in insureds being forced to purchase partial tail coverage for exposures no longer covered and to seek another insurer for the future.

(8) The freedom of an insured to shift its business to another insurer will be more restricted as such transfer will necessitate the purchase of a tail from the current insurer or nose coverage from the new insurer at a rate up to 200% of the current year's premium plus payment of a full year's premium to the new insurer.

(9) An insured who inadvertently overlooks the due date of a premium notice and is subsequently cancelled will not be able to purchase tail coverage. An insurer with several years' potential exposure to tail losses can escape its responsibility by this momentary oversight of the insured. Additionally, few insurers, if any, would write an insured with a retroactive date to cover these prior periods, leaving the cancelled insured with a huge gap in coverage. Under the occurrence form, the insured's potential gap in coverage is limited to the short period of the lapse in the policy.

(10) While the ISO policy does guarantee the purchase of a tail at a maximum 200% premium, such tail coverage is restricted to the remainder of any aggregate limit of coverage left at the end of the last year of the policy before expiration. Thus, an insured with many claims during

this last year (which could be the reason for the insurer's termination) might not have any meaningful coverage available under the tail. Insurers should offer an adequate percentage of the last year's annual aggregate limit as tail coverage, dependent upon the length of time the claims-made policy was in effect. ISO's form must be revised to increase the amount of coverage required to be offered under the tail policy. The claims-made Regulation to be promulgated by the Department contemplates an offer of tail coverage at least equal to a new aggregate limit if the claims-made form was in effect for more than two years.

(11) ISO has stated that the claims-made policy benefits insureds and potential third party claimants by offering coverage limits which can be increased year by year so that they may more closely approximate the dollar value of claims at the settlement date. Thus, in latent injury cases where the actual injury occurred many years ago but the manifestation of the injury occurs today, coverage for such claims can respond in 1985 dollars, if the insured has chosen to increase claims-made coverage limits. Under an occurrence policy, the limits purchased at the time of the original occurrence would still be applicable. However, the same objection raised to the occurrence form, that is, that it provides inadequate coverage for claims reported in the future, would be equally applicable to tail coverage in that such coverage may not exceed the limits of the terminated claims-made form even though claims under the tail coverage may not be reported until many years in the future.

(12) The difficulties encountered in calculating the premium under an occurrence form, because of

the uncertainties of unreported claims, would be equally applicable in calculating the premium for the tail coverage.

(13) The dual existence of both claims-made and occurrence forms for similar coverage creates a myriad of problems when attempts are made to reconcile reinsurance treaties and umbrella policies, for example, an umbrella policy issued on an occurrence basis when some of the required underlying coverage has been purchased on a claims-made basis. Rules must be developed to reconcile such coverage problems.

(14) The ISO claims-made CGL policy requires insureds to notify an insurer promptly of an occurrence which may result in a claim, but restricts coverage to claims made in writing against an insured during the policy period. Thus, an insured is placed in the difficult position of reporting an event for which coverage might not be adequate. There exists a real possibility of collusion between the insured and third party claimants to delay the making of a claim until limits can be increased on policy renewal. Conversely, should the insured report the incident, it is possible that the insurer might decrease coverage on renewal, cancel the policy, or raise the premiums. Disputes involving the date when a claim is reported are bound to result in increased litigation. Some of this litigation can be eliminated by triggering coverage to the reporting of an incident which may result in a claim.

(15) Potential third party claimants are not granted the same level of coverage availability under claims-made forms as currently exists under occurrence policies. Under an occurrence form, a third party claimant has access to an insured's

policy for any occurrence during the policy period regardless of when the claim is made. Under a claims-made form, should an insured leave the business or become insolvent or bankrupt, it is quite possible that such insured will not purchase tail coverage, thus leaving claimants without a source of recovery. It is generally acknowledged that the great majority of new businesses fail during their first five years. Section 3420 (a)(1) of the Insurance Law requires every liability policy issued in this state to contain "a provision that the insolvency or bankruptcy of the person insured, or the insolvency of his estate, shall not release the insurer from payment of damages for injury sustained or loss occasioned during the life of and within the coverage of such policy or contract". Subsection 3420 (a)(1) demonstrates a legislative intent that third party claimants should not suffer as a result of bankruptcy or insolvency of the insured. Claims-made policy forms increase the possibility that claimants will be without a source of recovery for their losses. Furthermore, in light of Section 3420(a)(1), for the protection of creditors and the public-at-large, it may be prudent to require that a claims-made policy automatically revert, upon an insured becoming a bankrupt, to an occurrence policy expiring as of the date of bankruptcy. Such a requirement would have to be reflected as an additional cost of coverage. Even a business which closes operation for reasons other than bankruptcy could find the financial burden of purchasing tail coverage too onerous to bear.

(16) Certificates of insurance written on a claims-made basis provided by third parties such as contractors are worthless if such contractor or principal fails to purchase tail coverage.

(17) A referee or judge faces a difficult decision when an entity with a claims-made liability policy is the subject of a bankruptcy proceeding. If funds are limited, what priority should be placed on the purchase of appropriate tail coverage?

The above concerns have caused the Department to limit the approval of claims-made policy forms to certain exposures, typically long tailed in nature with latent injury potential and where availability problems have been demonstrated.

Aggregate Annual limit of Coverage

The current ISO CGL policy contains a limit of liability per person and per occurrence as well as an annual aggregate limit for products liability and property damage liability. The revised CGL form contains, for the first time, an annual aggregate limit which will apply to all coverages under the CGL policy. The change is needed to eliminate unknown amounts of exposure as a result of several court decisions which have interpreted one occurrence affecting several entities to be separate occurrences, and have also raised the possibility that one occurrence involving prolonged exposure to harmful conditions might be interpreted as numerous separate occurrences in a one year period.

The aggregate annual limit should eliminate most of the uncertainty of indefinite exposure to loss and facilitate proper pricing of the general liability insurance product.

While an annual aggregate limit does involve a significant restriction in coverage, it is a change that should be readily understood by insureds, and that permits insureds to protect themselves by purchasing adequate annual aggregate limits of coverage. Therefore, such a provision in the ISO CGL occurrence form is approvable.

Exclusion of Coverage For Pollution

In the current ISO CGL form, pollution coverage is excluded if the introduction of the pollutants was other than "sudden and accidental". In the revised form, coverage is still excluded whenever the introduction of pollutants was intentional or gradual. Coverage is excluded also if the emission originates on a named insured premises or a waste disposal or treatment facility. Essentially the revised forms exclude most on-premises pollution liability coverage but ISO has filed an endorsement giving the insured the option of adding such coverage back to the policy for an additional premium.

The revised pollution exclusion is necessitated by adverse court decisions involving the interpretation of "sudden and accidental" and the liabilities created by Federal Superfund legislation. It is apparent that the insurance industry, given the current climate, considers pollution to be an uninsurable exposure. As with any exposures, which as a practical matter, are uninsurable in the voluntary market (for example, flood insurance), an alternative to the insurance mechanism should be developed to cover this exposure in order to protect victims. Such alternative could be a Joint Underwriting Association (JUA), a State Fund or the Federal Government acting as an insurer.

The pollution exclusion in the standard CGL policy will permit insurers to cover otherwise uninsurable exposures and thereby the improve availability of coverage. Risks having a minimal pollution exposure can obtain pollution coverage by purchasing the optional endorsement. This change is approvable.

We appreciate the efforts made by ISO, and the many interested parties to this filing, to advise the Department of the pros and cons of the controversial elements of this filing. The Department has weighed all of the data and testimony in arriving at a decision. The Department is cognizant of the availability and affordability problems

present in the commercial liability insurance marketplace, and pledges its resources in an effort to work with Governor Cuomo, the Legislature and the industry on a program that will encourage the insurance and general business communities to commit their resources to the continuing growth of this State.

/s/ James P. Corcoran
JAMES P. CORCORAN
SUPERINTENDENT
OF INSURANCE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-88-1688-WWS

(All Cases)

IN RE: INSURANCE ANTITRUST LITIGATION

DEFENDANTS' STATE-BY-STATE APPENDIX
(Relating to Defendants' Motions on McCarran-Ferguson Grounds and on Statutory Interpretation, Causation, and State Action Grounds)

* * * *

CALIFORNIA

(1) *Unfair Trade Practices Act*

(a) The California Insurance Code provides for the comprehensive regulation of all types of insurance in California by the Commissioner of Insurance through a statute based on the Model Unfair Trade Practices in Insurance Act written by the National Association of Insurance Commissioners (Cal. Ins. Code §§ 790-790.10).

(b) California law specifies that "[n]o person shall engage . . . in any trade practice which is . . . an unfair method of competition or an unfair or deceptive act or practice in the business of insurance" (Cal. Ins. Code § 790.02). Under the definitions found in the General Provisions of the Insurance Code, "person" is defined as "any person, association, organization, partnership, business trust, or corporation" (Cal. Ins. Code § 19).

(c) The California unfair trade practices law provides that "[t]he purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the [McCarran-Ferguson Act]" (Cal. Ins. Code § 790).

(d) The Commissioner has broad investigative and enforcement powers under the unfair trade practices law in conjunction with the powers under the Government Code to ensure compliance with the law by issuing cease and desist orders, ordering the payment of monetary penalties, and seeking court orders enjoining and restraining unlawful conduct (*e.g.*, Cal. Ins. Code §§ 790.05, 790.07; Cal. Gov't Code §§ 11180-11181).

(2) *Supervision of Contents of Policy Forms*

The State of California supervises the contents of policy forms through the Commissioner's discretionary powers over insurers and rating organizations described *infra* in ¶ 3(b)(ii).

(3) *Supervision of Rating Organizations*

(a) *Statutory Provisions for Collective Rate and Form Making*

During the relevant time, prior to the passage of Proposition 103 on November 8, 1988, California law provided that:

> Subject to and in compliance with the provisions of this chapter authorizing insurers to be members or subscribers of rating or advisory organizations . . . two or more insurers may act in concert with each other and with others with respect to any matters pertaining to the making of rates or rating systems [or] the preparation or making of insurance policy . . . forms. . . . [Cal. Ins. Code § 1853.]

Members and subscribers of rating organizations could "use the rates, rating systems, . . . or policy . . . forms

of such organizations, either consistently or intermittently" (Cal. Ins. Code § 1853.6).

(b) *Licensing and Supervision of Rating Organizations*

(i) California law provides that "[n]o rating organization shall conduct its operations in this state without first filing with the commissioner a written application for and securing a license to act as a rating organization" (Cal. Ins. Code § 1854). In order to obtain a license as a rating organization, the applicant rating organization must file with the Commissioner of Insurance, *inter alia*, its constitution, articles of agreement or certificate of incorporation, and bylaws and rules governing the conduct of its business (*id.*).

(ii) The Commissioner of Insurance has power to ensure that the policy forms of insurers and rating organizations comply with California law. The Commissioner may, "as often as may be reasonable and necessary," examine licensed rating organizations to ascertain whether "any rate or rating system made or used by it" complies with the requirements of the rates and rating organizations chapter of the Insurance Code (Cal. Ins. Code § 1857.1). In this regard, every insurer and rating organization must "maintain reasonable records . . . of the data, statistics or information collected or used by it in connection with the . . . policy . . . forms . . . made or used by it so that such records will be available at all reasonable times to enable the commissioner to determine whether . . ., in the case of an insurer or rating organization, every rate, rating plan and rating system made or used by it, complies with the provisions of this chapter" (Cal. Ins. Code § 1857). The maintenance of such records by the rating organization of which an insurer is a member is sufficient compliance by the insurer (*id.*). The Commissioner may also hold hearings on potential violations involving the rates, rating plans

or rating systems of a rating organization and, where appropriate, may suspend or revoke its license (Cal. Ins. Code §§ 1858.3, 1858.5).

(c) *ISO License*

ISO is licensed by the State of California "to conduct its operations and act as a Rating Organization in the State of California" (Exhibit 30).

(4) *Supervision and Review of the ISO CGL Forms*

[Intentionally left blank.]

(5) *Regulation of Reinsurance*

In addition to the unfair trade practices act discussed above in paragraph 1, California regulates reinsurers in the following ways:

(a) A reinsurer may become subject to regulation under licensing or authorization statutes (Cal. Ins. Code §§ 699 *et seq.*).

(b) Admitted reinsurers are subject to the same financial, reporting and oversight requirements as primary insurers (*e.g.*, Cal. Ins. Code §§ 699 *et seq.*). Each domestic reinsurer defendant has obtained a certificate of authority to transact business in California.

(c) Reinsurers or certain reinsurance transactions are regulated in other ways (*e.g.*, Cal. Ins. Code §§ 803, 810, and 1090).

(d) Reinsurers must meet certain specific standards if primary insurers are to receive credit (*e.g.*, in calculating assets, liabilities, reserves, risk limits) for ceded insurance (Cal. Ins. Code §§ 922.2 to 922.8).

(6) *Supervision and Review of Umbrella Excess Liability Coverage*

[Intentionally left blank.]

* * * *

CONNECTICUT

(1) *Unfair Trade Practices Act*

(a) Connecticut law provides for the comprehensive regulation of all types of insurance in Connecticut by the Commissioner of Insurance through a statute based on the Model Unfair Trade Practices in Insurance Act written by the National Association of Insurance Commissioners (Conn. Gen. Stat. §§ 38-60 to 38-64).

(b) Connecticut law specifies that "[n]o person shall engage in this state in any trade practice which is . . . an unfair method of competition or an unfair or deceptive act or practice in the business of insurance" (Conn. Gen. Stat. § 38-60). "Person" is defined as any "corporation, . . . Lloyds insurer, . . . and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters" (*id.*).

(c) [Intentionally left blank.]

(d) Connecticut law provides the Commissioner with broad investigative and enforcement powers to ensure compliance with the unfair trade practices law by issuing cease and desist orders, ordering the payment of monetary penalties, and suspending or revoking licenses (Conn. Gen. Stat. § 38-62).

(2) *Supervision of Contents of Policy Forms*

(a) The State of Connecticut supervises the contents of insurance policy forms through a file and use system. Connecticut law provides that "[t]he form of any insurance policy or contract the rates for which are subject to the provisions of this chapter . . . shall be filed with the insurance commissioner prior to its issuance" (Conn. Gen. Stat. § 38-201n(c)).

(b) Connecticut provides that "[i]f at any time the commissioner finds that any such policy, contract or en-

dorsement is not in accordance with such provisions or any other provision of law, he may issue an order disapproving the issuance of such form and stating his reasons therefor" (Conn. Gen. Stat. § 38-201n(c)).

(c) The Connecticut Insurance Commissioner has promulgated regulations setting forth eighteen specific bases on which a policy form may be disapproved, including that the submission "contains provisions which are unfair, deceptive or may encourage misrepresentation of the policy . . . . [or] is judged to be contrary to the public interest" (Conn. Ins. Comm. Bull. No. PF-2(14 and 18)). Forms may also be disapproved if they would result in rates that are excessive, inadequate, or unfairly discriminatory (Conn. Gen. Stat. § 38-201c(a)). In addition, policy forms that provide professional liability insurance written on a claims-made basis may be disapproved if they fail to contain certain mandatory provisions (Conn. Gen. Stat. § 38-370c).

(3) *Supervision of Rating Organizations*

(a) *Statutory Provisions for Collective Rate and Form Making*

Connecticut law requires filing of various insurance documents by every admitted insurer, but specifies that "[s]uch submission by a licensed rating organization of which an insurer is a member or subscriber shall be sufficient compliance with this section . . . to the extent that the insurer uses the . . . policy . . . forms of such organization" (Conn. Gen. Stat. § 38-201n(a)). Members and subscribers of rating organizations "may use the . . . policy . . . form of such organizations, either consistently or intermittently" (Conn. Gen. Stat. § 38-201f). Connecticut law states that "two or more insurers may act in concert with each other and with others with respect to any matters pertaining to the . . . preparation or making of insurance policies" (Conn. Gen. Stat. § 38-201d).

(b) *Licensing and Supervision of Rating Organizations*

(i) According to Connecticut law, "[n]o rating organization shall conduct its operations in this state without first filing with the insurance commissioner a written application for and securing a license to act as a rating organization" (Conn. Gen. Stat. § 38-201j(a)). In order to obtain a license as a rating organization, an applicant must file with the Commissioner of Insurance, *inter alia*, its constitution, articles of agreement or certificate of incorporation, and bylaws or rules governing the conduct of its business (Conn. Gen. Stat. § 38-201j(a)). The Commissioner "shall issue the license . . . if from such examination and investigation he is satisfied that: (1) The business reputation of the applicant and its officers is good; (2) the facilities of the applicant are adequate . . .; and (3) the applicant and its proposed plan of operation conform to the requirements of sections 38-201a to 38-201s" (Conn. Gen. Stat. § 38-201j(c)).

(ii) The Commissioner of Insurance has broad investigative and enforcement powers to ensure compliance by rating organizations with Connecticut law by holding hearings on complaints by "[a]ny person aggrieved by the action of an insurer or rating association" or by acting on his own initiative after examination of the entity's compliance with the requirements and standards of the insurance statutes (Conn. Gen. Stat. § 38-201p(a)). After a hearing, the Commissioner may suspend or revoke the license of an insurance or rating organization (*id.*). The Commissioner may, "as often as may be reasonable and necessary," examine a licensed rating organization (Conn. Gen. Stat. § 38-201o(a)). At the examination the following must be exhibited: "all books, records, accounts, documents or agreements governing its method of operation, together with all data, statistics and information of every kind and character collected or considered by such organization, group, association or insurer" (Conn. Gen.

Stat. § 38-201o(c)). In addition, every insurer and rating organization must

> maintain reasonable records . . . of the data, statistics or information collected or used by it in connection with the . . . policy . . . forms . . . made or used by it so that such records will be available at all reasonable times to enable the insurance commissioner to determine whether . . ., in the case of an insurer or rating organization, every rate, rating plan or rating system made or used by it, complies with the provisions of this chapter [682a] applicable to it. [Conn. Gen. Stat. § 38-201m(a).]

(c) *ISO License*

ISO is licensed by the State of Connecticut "to act as a Rating Organization in the State of Connecticut" (Exhibit 37).

(4) *Supervision and Review of the ISO CGL Forms*

(a) By letter dated July 12, 1985 (Exhibit 38), the Connecticut Department of Insurance advised ISO that, despite the Department's appreciation of the "considerable time and effort" expended by ISO (*id.* at p. 1), including "several meetings and conferences" between the Department and ISO (*id.*), the Department had decided to disapprove the CGL occurrence and claims-made forms as amended (GL 84-084CP(B)), citing, among other reasons, the following:

> The departure from the traditional system of risk acceptance to risk avoidance and risk transfer to the policyholder from the insurer.
>
> The current claims made proposal "trigger" is not acceptable. The requirement that the policyholder notify the company of incidents but that the policy will respond upon receipt of the claim places the insured in jeapordy [sic] if the company cancels or

requires the insured to purchase run-off coverage at excessive rates. . . . The mini-tail is not sufficient.

. . . Our standards (statutory) are that the policyholder has a contractual right to purchase prior acts and/or run-off coverage at a fixed cost throughout the policy period, and a grace period at termination. Non-payment does not invalidate this right of the insured.

. . . We do not agree with the ISO claims made pricing as being reasonable for the coverage provided. . . .

* * * *

. . . Introduction of aggregate limits is questioned inasmuch as ISO proposes an absolute pollution exclusion. It is the pollution problem uncertainty which creates a limits problem (multiple claims stacking, etc.). [*Id.* at pp. 1, 2.]

(b) Under cover of a letter dated October 28, 1985, ISO submitted the third amended versions of the CGL forms (GL 84-084(C) Amendment) to the Department of Insurance (*see* Group Exhibit 5).

(c) By Notice of Decision dated December 31, 1985 (Exhibit 39), the Commissioner of the Connecticut Insurance Department, following "a lengthy and complex investigation of the 'claims made system' of insurance proposed to be introduced [by ISO]," (*id.* at p. 1), disapproved the claims-made form. "As a part of the investigation, public comment and information was sought at various meetings . . . with representatives of ISO, the insurance agents association, the insurance risk managers, as well as other state insurance regulators" (*id.*). In the Notice of Decision, the Commissioner specified the following reasons for his ruling:

(i) Based upon this investigation it is determined that ISO's . . . (Claims-Made) policy form . . . fails

to meet the statutorily imposed requirements of Section 38-370c of the Connecticut General Statutes as applied to professional policies in failing to include provisions for the purchase of prior acts and variable coverage on a contractual basis. . . . [T]he failure to provide information relative to remaining insurance available to the insured at the time of purchase of an extended tail coverage results in the insured being denied basic information necessary to make an informed judgement [sic]. [*Id.* at pp. 1-2.]

(ii) The ability to charge up to 200% of the last annual premium for the purchase of tail coverage which may range from no insurance, because the aggregate limit has already been exceeded, or the full face value because there have been no claims assessed against the policy, places the insured in the untenable position of having to guess what insurance coverage will remain. Additionally, such a practice results in unfair discrimination, prohibited by Section 38-201c(a). . . . When, as in Connecticut, the public's right to know is central to all consumer legislation, and insurance contracts are statutorily required to be written in clear language, this deficiency cannot be tolerated. [*Id.* at p. 2.]

(iii) The . . . terms [of the proposed claims-made form] would eliminate a commercial insured's ability to assure himself of full coverage, regardless of the price he was willing to pay. The insurers' ability to cancel, nonrenew, advance retroactive dates, refuse tail coverage, and issue lazer [sic] endorsements, all on a unilateral basis, would deny policyholders any reasonable expectation that a Claims-Made policy would ultimately provide the coverage sought. [*Id.* at pp. 6-7.]

(i) ISO has consistently asserted that its members would not abuse their policyholders through arbitrary or unreasonable exercise of contract rights; and that

the use of this policy forms [sic] would be generally limited to large commercial insureds with high losses and long indeterminate loss payout periods. . . . The new Claims Made Form is filed for general use. If the ISO filing were approved it could be sold by a member company to any small business as well as the largest corporations in the State. . . . Insurance contracts need not, and should not, leave policyholders at the mercy of their insurers' good will and unilateral judgement. [*Id.* at p. 7.]

(v) ISO, by its various amendments to form filing number GL 84-084CP, has made numerous changes in a good faith effort to eliminate problems disclosed by the current investigation. . . . With these and other changes ISO made significant progress toward eliminating the deficiencies of the original Claims Made filing. However, several key problems remain. Although ISO has indicated a willingness to continue working towards their elimination, [the claims-made] policy form . . . cannot be approved until they are addressed. [*Id.* at pp. 8, 9.]

(vi) Although it is the understanding of this Department that a separate filing addressing the question of defense cost within aggregate limits is being considered, no changes have been made to eliminate the allocation of defense litigation costs to the policies aggregate liability limit. This handling of defense cost is contrary to general custom and practice and is unacceptable for several reasons. It places a burden on the insured to cover costs which he is powerless to control, and which may significantly reduce the aggregate limit of liability. The result would be that the insured may have less coverage remaining than he is aware of, or requires. Litigation defense costs have been traditionally born [sic] by insurers because the defense activities benefit the insurer as much if not more than the insured.

Insufficient justification has been presented which would warrant such a major change in insurance practice on this broad scale. [*Id.* at p. 12.]

(vii) The undersigned is satisfied that the insurance industry has fairly demonstrated a need for a Claims Made form of insurance, specifically in long tail types of commercial coverage. However, the changes which are being required prior to approval of such a policy form within this State are essential if the interests of the public are to be protected. [*Id.* at p. 12.]

In disapproving the CGL claims-made form, the Commissioner noted that his order should not be considered or construed as a disapproval of the CGL occurrence form as filed and amended and was entered "without prejudice to any subsequent refiling by [ISO]" (*id.* at p. 13).

(d) After ISO revised the CGL forms to address the standards set forth in the NAIC's CGL Extended Reporting Model Act (*see* Defendants' Statement, ¶ C(7)), ISO filed with the Connecticut Department of Insurance new versions of the forms under the filing designation GL 86-086FE, under cover of an ISO letter dated January 17, 1986 (*see* Group Exhibit 7).

(e) The Connecticut Insurance Department approved the CGL occurrence and claims-made forms effective February 5, 1986 (Group Exhibit 40).

(5) *Regulation of Reinsurance*

In addition to the unfair trade practices act discussed above in paragraph 1, Connecticut regulates reinsurers in the following ways:

(a) A reinsurer may become subject to regulation under licensing or authorization statutes (Conn. Gen. Stat. § 38-20).

(b) Admitted reinsurers are subject to the same financial, reporting and oversight requirements as primary insurers (*e.g.*, Conn. Gen. Stat. §§ 38-24, 38-25). Each domestic reinsurer defendant, except Mercantile & General Reinsurance and "Winterthur" Swiss Insurance Company, has obtained a certificate of authority to transact business in Connecticut.

(c) Reinsurers or certain reinsurance transactions are regulated in other ways (*e.g.*, Conn. Gen. Stat. §§ 38-452).

(d) Reinsurers must meet certain specific standards if primary insurers are to receive credit (*e.g.*, in calculating assets, liabilities, reserves, risk limits) for ceded insurance (Conn. Gen. Stat. §§ 38-110, 38-233).

(6) *Supervision and Review of Umbrella Excess Liability Coverage Forms*

In accordance with the Connecticut filing requirements described above in paragraph 2, defendant primary insurers filed their commercial umbrella excess forms with the Connecticut Department of Insurance (*see infra* Group Exhibits 41-44).

(a) The Department requested certifications that Aetna's commercial excess liability (umbrella) insurance coverage forms and Allstate's commercial umbrella/excess liability policy forms were in compliance with Connecticut law. Both Aetna (Group Exhibit 41) and Allstate (Group Exhibit 42) submitted, along with the certifications, amendatory cancellation/nonrenewal endorsements that complied with Connecticut termination requirements.

(b) The Department required INA to modify several of the provisions in its commercial umbrella liability form filing before it would be acceptable for use in the state. Specifically, the Department required INA to modify the forms' cancellation/nonrenewal provisions. After receiving a list of the Department's concerns, INA withdrew three of its forms (Group Exhibit 43).

(c) Hartford filed its umbrella liability pollution hazard exclusion, excess liability pollution hazard exclusion, excess liability forms, and umbrella liability forms with the Department. In accordance with Connecticut's "file and use" system, Hartford waited for the statutory period to receive any comments from the Department. When no comments were received, the forms were put into use (Group Exhibit 44).

* * * *

MONTANA

(1) *Unfair Trade Practices Act*

(a) Montana law provides for the comprehensive regulation of all types of insurance in Montana by the Commissioner of Insurance through a statute based on the Model Unfair Trade Practices in Insurance Act written by the National Association of Insurance Commissioners (Mont. Code Ann. §§ 33-18-101 to 33-18-1005).

(b) Montana law specifies that "[n]o person shall engage in this state in any trade practice which is . . . an unfair method of competition or an unfair or deceptive act or practice in the business of insurance" (Mont. Code Ann. § 33-18-102). "Person" is defined as "an . . . insurer, . . . , association, organization, Lloyd's, . . . corporation, or any other legal entity" (Mont. Code Ann. § 33-1-202(3)).

(c) The Montana unfair trade practices law specifies that "[t]he purpose of this chapter is to regulate trade practices in the business of insurance in accordance with the intent of [C]ongress as expressed in the [McCarran-Ferguson Act]" (Mont. Code Ann. § 33-18-101).

(d) The Montana Commissioner has broad investigative and enforcement powers to ensure compliance with the unfair trade practices law, including the power to issue

cease and desist orders, to order the payment of monetary penalties, and to seek court orders enjoining and restraining unlawful conduct (Mont. Code Ann. §§ 33-1-701 to 33-1-705, 33-18-1003 to 33-18-1005).

(2) *Supervision of Contents of Policy Forms*

(a) The State of Montana supervises the contents of insurance policy forms through a prior approval system. Montana law provides that "[n]o insurance policy . . . shall be delivered or issued for delivery in this state unless the form has been filed with and approved by the commissioner of this state" (Mont. Code Ann. § 33-1-501(1)).

(b) Montana law requires any policy form to be filed with the Commissioner of Insurance not less than sixty days prior to delivery (Mont. Code Ann. § 33-1-502(2)). During the sixty-day period, the Commissioner may "affirmatively approve or disapprove any such form" (*id.*).

(c) Montana has established statutory criteria for the disapproval of forms, permitting the Commissioner to disapprove or withdraw any previous approval of a policy form if it "contains or incorporates by reference . . . any inconsistent, ambiguous, or misleading clauses or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract," or contains a misleading title (Mont. Code Ann. § 33-1-502(1-4)).

(3) *Supervision of Rating Organizations*

(a) *Statutory Provisions for Collective Rate and Form Making*

Montana law provides that "[a]s to forms for use in . . . casualty . . . coverages, the filing required by this subsection may be made by a rating organization on behalf of its members and subscribers" (Mont. Code Ann. § 33-1-501(1)). Montana law also provides that "two or more insurers may act in concert with each other and with others with respect to any matters pertaining to the making of rates or rating systems, [or] the preparation or making of insurance policy or bond forms" (Mont. Code Ann. § 33-16-301).

(b) *Licensing and Supervision of Rating Organizations*

(i) According to Montana law, "[n]o rating organization shall conduct its operations in this state without first filing with the commissioner a written application for and securing a license to act as a rating organization" (Mont. Code Ann. § 33-16-401(1)). In order to obtain a license as a rating organization, the applicant rating organization must file with the Commissioner of Insurance its constitution, articles of agreement or certificate of incorporation, and bylaws or rules governing the conduct of its business (Mont. Code Ann. § 33-16-401(2)(a)).

(ii) The Commissioner of Insurance has broad investigative and enforcement powers to ensure compliance by rating organizations with Montana law. The Commissioner "shall, at least once every 5 years, and may as often as may be reasonable and necessary, make . . . an examination of each licensed rating organization" (Mont. Code Ann. § 33-16-106(1)(a)). The Commissioner may hold hearings on allegedly unlawful activity, and suspend or revoke the license of an insurance or rating organization (Mont. Code Ann. §§ 33-1-701, 33-16-111, 33-16-206).

(c) *ISO License*

ISO is licensed by the State of Montana "to act as a Rating Organization" (Exhibit 95).

(4) *Supervision and Review of the ISO CGL Forms*

[Intentionally left blank.]

(5) *Regulation of Reinsurance*

In addition to the unfair trade practices act discussed above in paragraph 1, Montana regulates reinsurers in the following ways:

(a) A reinsurer may become subject to regulation under licensing or authorization statutes (Mont. Code Ann. § 33-2-101).

(b) Admitted reinsurers are subject to the same financial, reporting and oversight requirements as primary insurers (*e.g.*, Mont. Code Ann. §§ 33-2-106, 33-2-109 to 112, 33-2-115). Each domestic reinsurer defendant, except Constitution Reinsurance and Mercantile & General Reinsurance, has obtained a certificate of authority to transact business in Montana.

(c) Reinsurers or certain reinsurance transactions are regulated in other ways (*e.g.*, Mont. Code Ann. §§ 33-2-1205, 33-2-1206, 33-2-1211, 33-2-1212).

(d) Reinsurers must meet certain specific standards if primary insurers are to receive credit (*e.g.*, in calculating assets, liabilities, reserves, risk limits) for ceded insurance coverage (Mont. Code Ann. §§ 32-2-501(8, 9), 33-2-1205(2-4)).

(6) *Supervision and Review of Umbrella Excess Liability Coverage Forms*

In accordance with the Montana filing requirements described in paragraph 2 above, defendant primary insurers filed their commercial general liability umbrella excess forms with the Montana Insurance Department (*see infra* Group Exhibits 96-99).

(a) The Department approved Aetna's commercial excess liability (umbrella) insurance coverage forms (Group Exhibit 96), Allstate's commercial umbrella excess liability forms (Group Exhibit 97), and INA's commercial umbrella policy forms (Group Exhibit 98) subject to inclusion of amendatory endorsements to bring the forms' cancellation provisions in compliance with Montana law.

(b) The Department approved Hartford's umbrella liability pollution hazard exclusion, excess liability pollution exclusion, umbrella liability policy forms and endorsements, and excess general liability forms filings (Group Exhibit 99).

* * * *

NEW YORK

(1) *Unfair Trade Practices Act*

(a) New York law provides for the comprehensive regulation of all types of insurance in New York by the Superintendent of Insurance through a statute based on the Model Unfair Trade Practices in Insurance Act written by the National Association of Insurance Commissioners (N.Y. Ins. Law §§ 2401 to 2409).

(b) New York law specifies that "[n]o person shall engage in this state in any trade practice constituting a defined violation or a determined violation as defined in the article" (N.Y. Ins. Law § 2403). "Person" is defined as "any legal entity subject to any provision of this chapter, engaged in the business of insurance in this state, including any . . . Lloyds insurer" (N.Y. Ins. Law § 2402(a)). New York law defines "insurance business" to include "a reinsurance business" (N.Y. Ins. Law § 1101(b)(1)(D)).

(c) The New York unfair trade practices law provides that "[t]he purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of [C]ongress as expressed in [the McCarran-Ferguson Act]" (N.Y. Ins. Law § 2401).

(d) The New York Superintendent has broad investigative and enforcement powers to ensure compliance with the unfair trade practices law, including the power to

issue cease and desist orders, to order the payment of monetary penalties, and to seek court orders enjoining and restraining unlawful conduct (N.Y. Ins. Law §§ 2405-2409).

(2) *Supervision of Contents of Policy Forms*

(a) The State of New York supervises the contents of insurance policy forms through a prior approval system.

(b) Pursuant to New York law, "[n]o policy form shall be delivered or issued for delivery unless it has been filed with the superintendent and either he has approved it, or thirty days have elapsed and he has not disapproved it" (N.Y. Ins. Law § 2307(b)). After notice and hearing "to the insurer or rate service organization which submitted a policy form for approval, the superintendent may withdraw approval of such form on finding that the use of such form is contrary to the legal requirements applicable at the time" (*id.*).

(c) New York has established statutory grounds for disapproval of policy forms, authorizing the superintendent to disapprove a form if, *inter alia*, it is "misleading or violative of public policy" (N.Y. Ins. Law § 2307(b)).

(3) *Supervision of Rating Organizations*

(a) *Statutory Provisions for Collective Rate and Form Making*

A rate service organization is defined to include "a person or entity which prepares and files policy forms and endorsements on behalf of insurers" (N.Y. Ins. Law § 2313(a)). New York law authorizes "[c]ooperation among rate service organizations or among rate service organizations and insurers in rate making or in other matters within the scope of this article [23]" (N.Y. Ins. Law § 2313(o)). Policy form filings are within the scope of Article 23 under Sections 2307 and 2313(a). New York law also provides that "[a]n insurer or group

of insurers may discharge the rate filing obligation . . . by giving notice . . . that it uses rates and rate information prepared by a designated rate service organization" (N.Y. Ins. Law § 2306).

(b) *Licensing and Supervision of Rating Organizations*

(i) According to New York law, "no insurer shall utilize the services of a rate service organization unless the organization has obtained a license" (N.Y. Ins. Law § 2313(b)). In order to obtain a license, the applicant rate service organization must file with the Superintendent of Insurance, *inter alia*, its constitution, articles of agreement or certificate of incorporation, and bylaws or rules governing the conduct of its business (N.Y. Ins. Law § 2313(d)(1)). "If the superintendent finds that the applicant . . . [is] competent, trustworthy, and technically qualified to provide the services proposed, and that all requirements of law are met, he shall issue a license specifying the authorized activity of the applicant" (N.Y. Ins. Law § 2313(g)).

(ii) The Superintendent of Insurance has broad investigative and enforcement powers to ensure compliance by rating organizations with New York laws. As often as the Superintendent deems it expedient, every licensed rate service organization may be examined (N.Y. Ins. Law § 2321(a)). Upon his own initiative or upon application by "any aggrieved person" the Superintendent may hold hearings on alleged violations by rate service organizations and impose appropriate sanctions (N.Y. Ins. Law § 2321). With respect to the collective activities among rate service organizations and insurers, New York law provides:

> The superintendent may review such cooperative activities and practices and if, after a hearing, he finds that any such activity or practice is unfair or unreasonable or otherwise inconsistent with this ar-

ticle, he may issue an order specifying in what respects such activity or practice is unfair or unreasonable or otherwise inconsistent with this article, and requiring the discontinuance of such activity or practice. [N.Y. Ins. Law § 2313(o).]

New York law also prohibits eleven specific types of anticompetitive behavior in which insurers or rate service organizations might engage (N.Y. Ins. Law § 2316).

(c) *ISO License*

ISO is licensed by the State of New York "as a Rate Service Organization" (Exhibit 110).

(4) *Supervision and Review of the ISO CGL Forms*

(a) By letter dated July 24, 1984 (Exhibit 111), the New York Insurance Department notified ISO that the CGL occurrence and claims-made forms were not approved.

(b) On April 25, 1985, the New York Insurance Department issued a news release (Exhibit 112) stating that "Superintendent of Insurance James P. Corcoran has announced that a public hearing will be held to highlight the possible advantages and potential disadvantages of a new 'claims-made' policy form, proposed by ISO . . . for commercial general liability policies," to be held on May 16, 1985 (*id.* at p. 1).

(c) By letter dated October 11, 1985 (Exhibit 113), the New York Insurance Department notified ISO that the CGL occurrence and claims-made forms, as amended by filings GL 84-084CP(A), GL 84-084CP(B), and GL 84-084CP(C), were "not approved" pending answers by ISO to specific questions posed by the Department with respect to the forms.

(d) Also on October 11, 1985, the Superintendent of the New York Insurance Department issued an Opinion and Decision on Significant Issues Raised by Insurance

Services Offices Inc. Filing on Commercial General Liability Claims-Made Policy Form (Exhibit 114), in which the Superintendent disapproved the CGL claims-made form as amended, approved the pollution exclusion provision, and indicated that he was still reviewing the CGL occurrence form.

(i) In the Opinion, the Superintendent noted that:

> In view of the extreme importance of this filing, the Department has solicited the views of all parties concerned with the commercial liability insurance product. The filing was the subject of a Public Hearing held at the Department on May 16, 1985 and many meetings with ISO and other concerned parties. A Joint Forum on the filing, sponsored by the Illinois, New York and Texas Insurance Departments took place on July 25, 1985 in Chicago, Illinois. [*Id.* at p. 2.]

(ii) In rendering his opinion, the Superintendent of Insurance acknowledged that "[a] need does exist to reduce an insurer's potential exposure caused by adverse and often contradictory court decisions, to enable insurers to better predict their potential loss exposure in order that the pricing of their product may be based on reasonable loss expectations" (*id.* at p. 3). However, the Department did "not agree that the claims-made policy form offers a long-term solution to uncertainty problems caused by adverse and or contradictory court decisions and was of the opinion that such form should only be utilized on risks involving long-tail or latent injury exposures where there is a determined availability problem" (*id.*).

(iii) In disapproving the claims-made version of the revised ISO CGL policy, the Superintendent stated that "[a]ll claims-made policy forms previously approved or to be approved in the future will be required to meet specified minimum standards, as set forth in a regulation

to be promulgated by the Department" (*id.* at p. 4). These minimum standards were to concern a variety of issues including extended claim reporting periods (tail) in the claims-made form, tail coverage, annual premiums, and retroactive date (*id.* at pp. 4-5).

(iv) The Superintendent noted "the principle bases for the Department's disapproval . . . of ISO's claims-made CGL policy form" (*id.* at p. 11). These included the Superintendent's observation that

> [t]he freedom of an insured to shift its business to another insurer will be more restricted as such transfer will necessitate the purchase of a tail from the current insurer or nose coverage from the new insurer at a rate up to 200% of the current year's premium plus payment of a full year's premium to the new insurer. [*Id.* at p. 13.]

(v) In approving the revised pollution exclusion, the Superintendent stated:

> The revised pollution exclusion is necessitated by adverse court decisions involving the interpretation of "sudden and accidental" and the liabilities created by Federal Superfund legislation. It is apparent that the insurance industry, given the current climate, considers pollution to be an uninsurable exposure. . . . The pollution exclusion in the standard CGL policy will permit insurers to cover otherwise uninsurable exposures and thereby the [sic] improve availability of coverage. Risks having a minimal pollution exposure can obtain pollution coverage by purchasing the optional endorsement. This change is approvable. [*Id.* at p. 17.]

(vi) The New York Superintendent also made clear the willingness of the New York Department of Insurance to participate with the industry in revisions to the forms, stating:

> An effort should be made by all parties at interest to provide a workable definition of occurrence that will reflect the exposure contemplated for the premium charged. The Department stands ready to assist the industry in drafting policy language or legislation that will rationalize inconsistent court decisions. [*Id.* at p. 11.]
>
> * * * * *
>
> We appreciate the efforts made by ISO, and the many interested parties to this filing, to advise the Department of the pros and cons of the controversial elements of this filing. The Department has weighed all of the data and testimony in arriving at a decision. The Department is cognizant of the availability and affordability problems present in the commercial liability insurance marketplace, and pledges its resources in an effort to work with . . . the industry on a program that will encourage the insurance and general business communities to commit their resources to the continuing growth of this State. [*Id.* at p. 17.]

(e) By letter dated October 11, 1985 (Exhibit 115), the New York Insurance Department submitted a list of questions to ISO concerning various provisions and aspects of the CGL occurrence and claims-made forms as amended. ISO responded to those questions by letter dated November 15, 1985 (Exhibit 116).

(f) By letter dated December 16, 1985 (Exhibit 117), the New York Insurance Department confirmed a telephone conversation with ISO advising that the claims-made forms were still not approved in accordance with Superintendent Corcoran's decision of October 11, 1985 (*id.*).

(g) By letter dated February 12, 1986 (Exhibit 118), the New York Insurance Department notified ISO of its continuing disapproval of the 1986 claims-made version of the CGL form, stating:

As you are aware, for reasons set forth in its Opinion and Decision dated October 11, 1985 the Department has determined that ISO's proposed Commercial General Liability (CGL) claims-made policy form does not meet the statutory requirements of Section 2307(b) of the Insurance Law.

We have reviewed the various amendments submitted, including those detailed in your letter of January 17, 1986 [submitting the GL 86-086 FE filing], and find that they do not form a basis to revise the Department's premise for disapproving the initial claims-made policy filing. The Department is still of the opinion that widespread use of the claims-made policy is inappropriate and unnecessary for most CGL risks. Therefore, ISO's CGL claims-made policy as originally submitted as well as *all* subsequent amendments and endorsements pertaining to claims-made policies remain disapproved. . . . Please note that ISO's proposed CGL occurrence policy form and related amendments and endorsements which have been filed simultaneously with the claims-made are currently under review and remain unapproved. [*Id.*]

(h) By letter dated February 14, 1986 (Exhibit 119), the New York Insurance Department notified ISO that the CGL occurrence form had not been amended to address the Department's concerns expressed in its December 16, 1985 letter to ISO concerning the omission of the terms "groundless, false or fraudulent" in the occurrence policy, and, therefore, "the occurrence policy portion . . . remains not approved."

(i) By letter dated March 17, 1986 (Exhibit 120), ISO unbundled the revised CGL occurrence form from the revised CGL claims-made form and filed it with the New York Superintendent of Insurance, stating that ISO had "sought and received authorization from the ISO Board of Directors to file an 'occurrence'-only version of

the program in those few states where approval of the full [CGL] program is not expected in the near future" (*id.*).

(j) By letter dated March 21, 1986 (Exhibit 121), the New York Insurance Department notified ISO that the unbundled CGL occurrence form had been approved effective April 1, 1986 in accordance with ISO's request.

(k) On July 16, 1986, the New York Insurance Department issued a news release announcing that the New York Insurance Department had promulgated Regulation No. 121 (Group Exhibit 122) governing the approval of claims-made forms "the original of [which could] be found in the Department's October 11, 1985 Opinion and Decision, which deals in detail with the claims-made concept" (*id.* at news release p. 1). According to the release:

> Regulation No. 121 reaffirms the Department's position that widespread use of the claims-made policy approach would be inappropriate as well as unnecessary for most Commercial General Liability (CGL) risks. The claims-made approach is nonetheless appropriate for certain types of liability risks. The Regulation, therefore, identifies those specific areas and articulates pertinent criteria. In those areas where claims-made policies are permitted, the Regulation also prescribes minimum standards applicable to such policies. [*Id.* at p. 1.]
>
> * * * *
>
> Pursuant to Regulation No. 121, the Department will continue to approve claims-made policies, if they meet minimum standards, where substantial availability problems have been experienced or where the exposure has long-tail or latent injury characteristics. Thus claims-made policies are permissible in connection with the following specific types of coverages or risks: . . . pollution and environmental impairment liability; . . . public entity liability; . . . product liability . . . . [*Id.* at p 2.]

(l) On January 30, 1987, the New York Insurance Department issued a news release (Exhibit 123) announcing that the New York Superintendent of Insurance had that day "proposed a series of significant changes to existing Department regulations dealing with claims-made policies and legal defense cost treatment in connection with liability insurance policies," and had announced a public hearing to be held on February 20, 1987 (*id.* at p. 1).

(m) Effective August 21, 1987, Regulation No. 121, which concerns the minimum standards applicable to claims-made policies, was amended by the New York Insurance Department (Exhibit 124).

(5) *Regulation of Reinsurance*

In addition to the unfair trade practices act discussed above in paragraph 1, New York regulates reinsurers in the following ways:

(a) A reinsurer may become subject to regulation under licensing or authorization statutes (N.Y. Ins. Law §§ 1102, 1114).

(b) Admitted reinsurers are subject to the same financial, reporting and oversight requirements as primary insurers (*e.g.*, N.Y. Ins. Law §§ 307(a)(1), 308, 309(a), 1301, 1304, 1305). Each domestic reinsurer defendant has obtained a certificate of authority to transact business in New York.

(c) Reinsurers or certain reinsurance transactions are regulated in other ways (*e.g.*, N.Y. Ins. Law §§ 1114 (a-b), 1308, 4102(c), N.Y. Admin. Code tit. 27, § 86.2).

(d) Reinsurers must meet certain specific standards if primary insurers are to receive credit (*e.g.*, in calculating assets, liabilities, reserves, risk limits) for ceded insurance (N.Y. Ins. Law §§ 1115(a), 1301(a)(11, 14, 15), 1305(b)(3), 1308, 4118(a)(1)(A), N.Y. Admin. Code tit. 27, Part 125).

(6) *Supervision and Review of Umbrella Excess Liability Coverage Forms*

Defendant primary insurers filed their commercial general liability umbrella excess forms with the New York Insurance Department (*see infra* Group Exhibits 125, 127, 128, and Exhibit 126).

(a) The Department required Aetna to make several changes in Aetna's commercial excess liability (umbrella) insurance coverage forms before the Department would give its approval. Specifically, the Department required Aetna to change its claims-made umbrella forms in order to comply with Regulation 121, which establishes the minimum terms and conditions that claims-made policies must contain before they can be approved in New York State. In addition, the Department required Aetna to amend its filinffig to comply with the cancellation nonrenewal provisions contained in Chapter 220 of the Laws of 1986. Other changes were required by the Department before it approved Aetna's filing (Group Exhibit 125).

(b) The Department disapproved INA's "schools" endorsement to the commercial umbrella liability policy forms because it was the Department's position that the endorsement violated public policy (Exhibit 126).

(c) The Department required Allstate to make several changes in its commercial umbrella excess liability policy forms in order to obtain approval to use the forms in New York. Specifically, the Department required Allstate to modify its forms to comply with a number of New York's laws, including those governing cancellation nonrenewal requirements, minimum SERP requirements, and disclosure notice requirements for claims-made forms. Additionally, in response to the Department's concerns, Allstate withdrew its claims-made commercial umbrella excess liability policy forms from review. (Group Exhibit 127).

(d) The Department approved Hartford's umbrella liability pollution hazard exclusion and excess liability pollution hazard exclusion form filings (Group Exhibit 128).

* * * *

FLORIDA

* * * *

(3) *Supervision of Rating Organizations*

(a) Statutory Provisions for Collective Rate and Form Making

One of the purposes of the rates and rating organization part of the Florida insurance statutes is "[t]o authorize cooperation between insurers in ratemaking and other related matters" (Fla. Stat. § 627.031(1)(d)). Florida law authorizes cooperation in the making of policy forms as follows: "[T]wo or more insurers may act in concert with each other and with others with respect to any matters pertaining to . . . [t]he preparation or making of insurance policy . . . forms" (Fla. Stat. § 627.314(1)). In addition, Florida law states that "[l]icensed rating organizations and authorized insurers are authorized to exchange information and experience data with rating organizations and insurers in this and other states and may consult with them with respect to rate making and the application of rating systems" (Fla. Stat. § 627.314(4)).

* * * *

ILLINOIS

* * * *

(3) *Supervision of Rating Organizations*

(a) Statutory Provisions for Collective Rate and Form Making

Illinois law authorizes cooperation in the making of policy forms. Illinois law provides that "[c]ompanies

that are members of an [advisory] organization, bureau or association may have [policy forms] filed for them by [the] organization, bureau or association" (Ill. Ann. Stat. ch. 73, § 755(2); *see also* Ill. Admin. Code tit. 50, § 753.10(b)). Any advisory organization is authorized "to formulate insurance policies . . . and to furnish that which it prepares to its members and subscribers" (Ill. Ann. Stat. ch. 73, § 735A-9(1)). With respect to such activities of an advisory organization, "two or more companies are authorized to act in concert with each other and with others" (Ill. Ann. Stat. ch. 73, § 735A-9(2)). Moreover, "[a]dvisory organizations, or advisory organizations and companies may exchange the type of information . . . authorized under this Article" (Ill. Ann. Stat. ch. 73, § 735A-12).

* * * *

[PLAINTIFF STATES' UNIFIED DISTRICT COURT BRIEF]

MCCARRAN-FERGUSON ACT AND LEGISLATIVE HISTORY APPENDIX

* * * *

B. LEGISLATIVE HISTORY EXCERPTS

Set out here are key excerpts from the legislative history of the McCarran-Ferguson Act.

1. 90 Cong. Rec. A4406 (1944) (Joint Statement of Chairmen of NAIC on proposed bill):

> No exemption is sought nor expected for oppressive or destructive practices. On the whole, insurance has been conducted on a high plane, with great benefit to the public, and if inconsistent procedures are found they must be eradicated. Provision is made that the Sherman Act shall not now or hereafter be inapplicable to any act of boycott, coercion, or intimidation.
>
> . . . .

2. 90 Cong. Rec. A4407 (1944) (NAIC Memorandum of Explanation):

> [Subsection (b) of the NAIC proposed bill] is based, in a general way, upon the decision of the United States Supreme Court in the case of *Parker v. Brown*, supra.
>
> This subsection likewise is intended to put without the scope of the Sherman Act certain cooperative efforts among and between insurers which are regarded as in the public interest. For instance, cooperative service, adjustment and inspection agreements reduce costs. Likewise, the collection of statistical data is essential for rate-making purposes. . . .
>
> Briefly, this subsection recognizes that if insurers are to be permitted to combine not only for rate-making purposes, but to enforce as well by agreement the use of the rates so made, their activity shall be subject to legal review by State authority. It also gives consideration to the principle of States' rights by giving cognizance to the prerogative of any State to choose between rate regulation and so-called open competition. However, in the latter event the competition must in fact be open. No twilight zone is permitted, and where any group of insurers seek [sic] to act in concert to enforce so-called advisory rates, the antitrust laws will not be inapplicable.
>
> . . . .

3. 91 Cong. Rec. 478 (1945):

> *Mr. McKELLAR*:
>
> As I understand the bill its purpose and effect will be to establish the law as it was supposed to be prior to the rendering of the recent opinion of the Supreme Court of the United States [*Southeastern Underwriters*]. Is that correct?
>
> *Mr. FERGUSON*: No.

4. 91 Cong. Rec. 479 (1945):

> *Mr. MURDOCK*:
>
> Does the bill in its present form contemplate that a State legislature may enact laws which would permit agreements in violation of the Sherman Act?
>
> *Mr. FERGUSON*:
>
> I would say that until June 1, 1947, State legislatures could enact laws which would be in conflict with the Sherman Act, but could not pass laws which would permit either an agreement or an act on the part of an insurance company, or insurance companies, of boycott, coercion, or intimidation.

5. 91 Cong. Rec. 479 (1945):

Mr. FERGUSON:

I do not believe that under the bill a State could pass a law permitting an agreement or an act of boycott, coercion, or intimidation.

6. 91 Cong. Rec. 480 (1945):

Mr. O'MAHONEY:

Does the Senator from Michigan conceive that the pending bill . . . has the effect of making it possible for any State to authorize attempts on the part of any group of insurance companies to monopolize the business of insurance. I did not understand that to be the opinion of the Senator from Michigan.

Mr. FERGUSON:

No. I will answer that by saying that if agreements in restraint of trade or to monopolize amounted either to a boycott and/or coercion and/or intimidation, they would be absolutely void, because they would contradict the bill which is now being considered by the Senate and which it is hoped will be passed today. But certain agreements might be permitted in the States if they did not violate the terms of this bill.

7. 91 Cong. Rec. 480-81 (1945):

Mr. FERGUSON:

A State law . . . relating to regulation, for instance, the fixing of rates, or the fixing of the terms of a contract of insurance, which might under some definitions of monopoly be monopolistic, would be permitted under the pending bill; but if the State law undertook to authorize a boycott, a coercion, or an intimidation, or an agreement to do any one of those three things, then it would be clearly void because Congress would have already spoken, and once Congress speaks on interstate commerce, no State can speak contrary to the congressional declaration.

8. 91 Cong. Rec. 1443 (1945):

Mr. FERGUSON:

I believe that a statement as to the fair construction of the act would add to the helpfulness of what the Senator from Nevada has said. There are certain things which a State cannot interfere with. It cannot interfere with the application of the Sherman Act to any agreement to boycott, coerce, or intimidate, or an act of boycotting, coercion, or intimidation.

Mr. McCARRAN: Not at any time.

Mr. FERGUSON: Not at any time.

Mr. McCARRAN:

Nor is the control of those matters under the specified antitrust acts removed at any time.

9. 91 Cong. Rec. 1444 (1945):

Mr. O'MAHONEY:

They [the Sherman Act and the Clayton Act] "shall be applicable"—there is a positive declaration—"to the business of insurance to the extent such business is not regulated by State law," as was stated by one of the House Members of the conference committee . . . . I do not conceive this to be a grant of power to the States to authorize by permissive legislation obviously adverse combinations which would be against the public interest.

Mr. PEPPER:

Am I correct in saying that under the proviso which the Senator has just read, if a State made it an offense, under the laws of the State, to engage in combinations in restraint of trade, the Sherman Antitrust Act could not apply to combinations and restraints of trade by companies engaged in business in that State? Is that not what it means?

Mr. O'MAHONEY:

No; I think that, for example, a rating bureau, formerly agreement [sic] among insurance companies, under the supervision and regulation of the State, would be permitted.

10. 91 Cong. Rec. 1444 (1945):

Mr. WHITE:

My view is that the State may regulate. If, however, the State goes only to the point indicated [prohibiting restraints of trade], then these Federal statutes apply throughout the whole field beyond the scope of the State's activity.

11. 91 Cong. Rec. 1444 (1945):

Mr. BARKLEY:

I should like to ask, in this connection, whether, where States attempt to occupy the field—but do it inadequately—by going through the form of legislation so as to deprive the Clayton Act, the Sherman Act, and the other acts of their jurisdicion [sic], it is the Senator's interpretation of the conference report that in a case of that kind, where the legislature fails adequately even to deal with the field it attempts to cover, these acts still would apply?

Mr. McCARRAN: That is my interpretation.

12. 91 Cong. Rec. 1480 (1945):

Mr. O'MAHONEY:

I sympathize very deeply with the concern which the Senator from Florida [Mr. Pepper] has expressed this morning lest anything should be done by the Congress which would enable private abuses to continue in the insurance field. I am convinced, however, that the apprehensions which the Senator states with respect to this conference report are not well founded.

I wish to call the Senator's attention to the Supreme Court decision in the case Parker against Brown. . . .

I take it the Senator is apprehensive lest a statute passed by a State attempting to give validity to a private agreement to regulate would be recognized under this [decision]. I think it would not, because on page 351 of . . . Parker against Brown, I find this language from the Supreme Court:

> True, a State does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful (*Northern Securities Co. v. United States*, 193 U.S. 197, 332, 344-47).

Therefore I have no doubt in my own mind that no State, under the terms of the conference report, could give authority to violate the Sherman antitrust law . . . .

13. 91 Cong. Rec. 1480 (1945):

Mr. O'MAHONEY:

There has never been any doubt . . . that private agreements by which these rates were enforced were violations and are violations of

the antitrust laws. There is nothing in the conference report that relieves insurance companies from the prohibition of the antitrust law, because there has been written back into the bill language which was taken out by the House which would have exempted agreements from the prohibition of the antitrust law. Therefore any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited by this provision.

14. 91 Cong. Rec. 1481 (1945):

Mr. FERGUSON:

Under the language which is now the bill as it appears in the conference report, if a State passes an act regulating insurance or taxing insurance, and that regulation is contrary to the Sherman Act or the Clayton Act, with three exceptions, then the State law would be the law. Here are the exceptions:

> Nothing contained in this act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

In other words, under the terms of the bill, there are six things on which a State could not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate. But with respect to anything else, if the States were specifically to legislate upon a particular point, and that legislation were contrary to the Sherman Act, the Clayton Act, or the Federal Trade Commission Act, then the State law would be binding. That is exactly

what we attempted to do in the bill. It is clear what we intended to do. . . .

15. 91 Cong. Rec. 1483 (1945):

Mr. O'MAHONEY:

Mr. President, there are three forms of regulation. There is State regulation. . . . There is Federal regulation. . . .

The third, and this has been harmful to the public interest, is regulation by private combinations and groups . . . through private rules and regulations under which persons engaged in the insurance industry could be tried and convicted for the violation of private law. That type of regulation would be absolutely outlawed should the conference report be adopted.

16. 91 Cong. Rec. 1485 (1945):

Mr. O'MAHONEY:

The vice in the insurance industry, Mr. President, was not that there were rating bureaus, but that there was in the industry a system of private government which had been built up by a small group of insurance companies, which companies undertook by their agreements and understandings to invade the field of Congress to regulate commerce. These private groups sought, by the imposition of penalties . . . to enforce not public regulations written by public authority but regulations for the insurance business which they wrote themselves in their wholly private and exclusive associations.

To me, Mr. President, this conference report represents a tremendous gain because it outlaws completely all steps by which small groups have attempted to establish themselves in control in the great interstate and international business of insurance.

. . . .

17. 91 Cong. Rec. 1486 (1945):

Mr. O'MAHONEY:

> Moreover, [the McCarran-Ferguson Act] . . . . [L]eaves the antitrust laws in full force and effect . . . against boycotts and agreements to boycott . . . . There are agreements and combinations . . . which ought to be outlawed, and which . . . would be completely outlawed. I refer to the prohibition against agreements to coerce or intimidate . . . .
>
> [T]he great gain which has been achieved by the complete agreement of the Senate and House conferees, to the effect that agreements as well as acts of boycott, coercion, and intimidation should be outlawed, is so distinctly in the public interest . . . .

18. 13 *Public Papers and Addresses of Franklin D. Roosevelt: 1944-45* 587 (Rosenman ed. 1950) (commentary of Pres. Roosevelt on signing into law the McCarran-Ferguson Act):

> It is clear from the legislative history and the language of this Act, that the Congress intended no grant of immunity for monopoly or for boycott, coercion, or intimidation. Congress did not intend to permit private rate fixing, which the Anti-trust Act forbids, but was willing to permit actual regulation of rates by affirmative action of the States.
>
> . . . .

[PLAINTIFF STATES' UNIFIED DISTRICT COURT BRIEF]

STATES' REGULATORY APPENDIX

Pursuant to Local Rule 220-7, the States submit this Regulatory Appendix ("Appendix") in opposition to Defendants' McCarran and State Action motions and in support of the States' Cross-Motion for Summary Judgment on State Action Grounds.

This Appendix identifies state insurance statutes relevant to the present litigation. It also identifies when there is no state statute addressing or regulating a particular conduct. Lastly, it briefly describes the process by which each State reviewed the 1986 ISO CGL forms.[1]

The Appendix is divided into eighteen parallel sections, one for each of the States responding to defendants' motions. Each section contains statutory material in support of the following propositions:

A. State statutes express an overall policy disfavoring collusion and favoring competition in the provision of insurance coverages;

B. State statutes specifically prohibit acts and agreements constituting boycott, coercion and intimidation;

C. State statutes pertaining to the review of insurance policy forms do not clearly articulate

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[1] This Appendix does not, however, respond to every factual issue raised in defendants' filings with the Court. For example, on the basis of the Banfield Affidavit, Exhibit I, defendants contend that the State of Connecticut conducted two hearings on the ISO CGL forms. The States can offer affidavits demonstrating that Connecticut conducted no such hearings. In keeping with this Court's instructions that the parties avoid "papering" the record with unnecessary filings, the States have not responded to such immaterial (and erroneous) assertions. If the Court finds that such factual assertions are material and appropriate for consideration at this time, the States reserve their right to file opposing factual affidavits.

and affirmatively express an intention to displace competition regarding the availability or use of such forms;

D. State statutes pertaining to the filing of rates do not clearly articulate and affirmatively express an intention to displace competition regarding the availability of use of advisory rates; nor do they express such an intention regarding the availability or use of policy forms;

E. State statutes do not regulate the activities of reinsurers in any manner meaningful to the claims pleaded in the complaint;

F. State Unfair Trade Practices do not express an intention to displace competition regarding the development of policy forms or the use of such forms; and

G. State insurance departments did not determine whether defendants had engaged in anticompetitive conduct for the purpose of eliminating consumer-desired coverages.

* * * *

STATES' REGULATORY APPENDIX
STATE OF CALIFORNIA

A. CALIFORNIA STATUTES EXPRESS AN OVERALL POLICY DISFAVORING COLLUSION AND FAVORING COMPETITION IN THE PROVISION OF INSURANCE COVERAGES.

1. Cal. Ins. Code ch. 9, §§ 1850-1859.1, the McBride-Grunsky Act, establishes standards applicable to rates and rating organizations. The express purpose of the Act is "to permit and encourage competition between insurers [and not to] give the Commissioner power to fix and determine a rate level by classification or otherwise." Cal. Ins. C. § 1851(a).

B. CALIFORNIA STATUTES SPECIFICALLY PROHIBIT ACTS AND AGREEMENTS CONSTITUTING BOYCOTT, COERCION AND INTIMIDATION.

1. Cal. Ins. C. § 790.03(c) prohibits "Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance."

C. CALIFORNIA STATUTES PERTAINING TO INSURANCE POLICY FORMS DO NOT CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF SUCH FORMS.

1. There are no provisions of California law concerning supervision or review of CGL forms. The filing of forms with the Insurance Commissioner is not required.

2. California has no statutes which address umbrella or excess liability coverage. The Insurance Code provides that when insurance coverage is not available from admitted insurers it may be procured from nonadmitted insurers through licensed surplus lines brokers. Forms used by surplus lines brokers are not subject to review or approval by the Insurance Commissioner.

D. CALIFORNIA STATUTES PERTAINING TO THE FILING OF RATES DO NOT CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF ADVSORY RATES; NOR DO THEY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF POLICY FORMS.

1. Under the McBride-Grunsky Act, Cal. Ins. Code ch 9, Sections 1850-1859.1, insurers may act in concert with

one another on the making of rates or policy forms to the extent they do so as members of rating organizations. However, they are explicitly prohibited from agreeing to adhere to such rates or forms. Cal. Ins. C. § 1853.6. Further, the express purpose of the Act is to "encourage competition between insurers."

E. CALIFORNIA STATUTES DO NOT REGULATE THE ACTIVITIES OF REINSURERS IN ANY MATERIAL RESPECT.

1. California licensing statutes, which require admission of insurers for specified classes of insurance before they can transact such business, include no references to reinsurance as a specified class, or at all. Cal. Ins. C §§ 699 et seq.. Those defendant domestic reinsurers actually holding certificates of authority to transact business in California do so as primary insurers.

2. There is no review or regulation of reinsurance rates, forms, or any of the terms or conditions on which reinsurance is sold. Reinsurance operations are expressly exempted from such regulation. Cal. Ins. C. § 1851(a).

F. CALIFORNIA'S UNFAIR INSURANCE PRACTICES ACT DOES NOT EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE DEVELOPMENT OF POLICY FORMS OR THE USE OF SUCH FORMS.

1. The California Unfair Practices Act, Cal. Ins. C. §§ 790 et seq., is a consumer-oriented statute directed primarily toward deceptive advertising, marketing and claim settlement practices and discrimination. § 790.03 ("Prohibited unfair or deceptive acts or practices"). The Act enunciates a general policy prohibiting trade practices which constitute "unfair practices in business of insurance". § 790.02.

2. Contrary to defendants' characterization, the Act does not provide for the "comprehensive regulation of

all types of insurance in California by the Commissioner of Insurance." Rather, the Act defines certain conduct (including boycott, coercion and intimidation) to be an unfair trade practice and establishes certain enforcement authority for the Insurance Commissioner to remedy those violations. The Commissioner may hold hearings, issue cease and desist orders, and obtain court orders against unfair practices. §§ 790.05-790.07. Until 1987 the maximum penalty for willful violation of such an order was $500. § 790.07.

The Act is not intended to relieve its violators of either civil or criminal liability under other laws. § 790.09.

3. To the extent the Act applies to anticompetitive conduct, it enunciates an intention to preserve, not displace, competition. The Act contains no provision which affirmatively expresses as state policy any intent to displace competition in the insurance industry.

G. [Intentionally left blank. See Section C above.]

* * * *

STATES' REGULATORY APPENDIX
STATE OF CONNECTICUT

A. CONNECTICUT STATUTES EXPRESS AN OVERALL POLICY DISFAVORING COLLUSION AND FAVORING COMPETITION IN THE PROVISION OF INSURANCE COVERAGES.

1. The Connecticut insurance code demonstrates an overall concern that the insurance market in Connecticut remain competitive. Conn. Gen. Stat. § 38-201dd constitutes a legislative finding that the purposes of, *inter alia*, §§ 38-201j(b) and 38-201(n) are as follows:

> (1) *To prohibit noncompetitive behavior by insurers*; (2) to protect policyholders and the public against the adverse effects of excessive, inadequate or unfairly discriminatory rates; (3) *to promote price competition among insurers so as to provide rates*

which are responsive to competitive market conditions; (4) to promote sufficient consumer activity in the ~~marketplace~~ in order to generate a regulatory effect on price; (5) to improve availability, fairness and reliability of insurance; (6) to authorize essential cooperative action among insurers in the rate-making process and to regulate such activity *to prevent practices that tend to substantially reduce competition or create a monopoly*; (7) to encourage the most efficient and economic marketing practices; (8) to provide price and other information to enable consumers to purchase insurance suitable for their needs and *to foster competitive insurance markets*; and (9) to provide the insurance commissioner with authority to impose regulatory controls in the event ~~that the~~ other purposes are not accomplished. (Emphasis added).

2. Members and subscribers of rating organizations "may use the . . . policy . . . form of such organizations, either *consistently* or *intermittently*, but, except as provided in §§ 38-201(e), 38-201(h), and 38-201j, *shall not agree with each other or rating organizations or others to adhere thereto*." Conn. Gen. Stat. § 38-201(f). (Emphasis added).

3. § 38-201j(b) provides, *inter alia*, that in order

   To obtain and retain a license, a rating organization shall provide satisfactory evidence to the insurance commissioner that it will: . . . (2) neither have nor adopt any rule or exact any agreement, the effect of which would be to require any member or subscriber as a condition to membership or subscribership, to *adhere to its rates, rating plans, rating systems, underwriting rules, or policy or bond forms*; . . . (4) *neither practice nor sanction any plan or act of boycott, coercion or intimidation*; (5) neither enter into nor sanction any contract or act by which any person is restrained from lawfully engaging in the insurance business, ... (Emphasis added).

4. Connecticut law prohibits any person from engaging in unfair methods of competition or unfair or deceptive acts or practices in the business of insurance. Conn. Gen. Stat. §§ 38-60 to 38-64.

5. Connecticut insurance statutes do not refer to the McCarran-Ferguson Act, nor does Connecticut's antitrust law contain an insurance exemption similar to the McCarran-Ferguson Act. Conn. Gen. Stat. §§ 35-24, *et seq.*, See Conn. Gen. Stat. § 35-31 (exemption).

B. CONNECTICUT STATUTES SPECIFICALLY PROHIBIT ACTS AND AGREEMENTS CONSTITUTING BOYCOTT, COERCION, AND INTIMIDATION.

1. Connecticut law defines "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance" to include, among other things, "boycott, coercion and intimidation" and prohibits any person from entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance. Conn. Gen. Stat. § 38-61(4).

2. Rating organizations are prohibited from practicing or sanctioning any plan or act of boycott, coercion, or intimidation by Conn. Gen. Stat. § 38-201j(b).

C. CONNECTICUT STATUTES PERTAINING TO THE REVIEW OF INSURANCE POLICY FORMS DO NOT CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF SUCH FORMS.

1. The State of Connecticut reviews the contents of insurance policy forms through a file and use system. Connecticut law provides that "[t]he form of any insur-

ance policy or contract the rates for which are subject to the provisions of this chapter other than fidelity, surety or guaranty bonds, shall be filed with the insurance commissioner prior to its issuance." Conn. Gen. Stat. § 38-201n(c). Until 1988 the Commissioner did not possess the authority to adopt regulations for procedures to review such policies. "The commissioner shall adopt regulations . . . establishing a procedure for review of such policy or contract." 1988 Conn. Pub. Acts No. 88-326, § 6(c), effective October 1, 1988, amending Conn. Gen. Stat. § 38-201(n)(c).

2. By virtue of the adoption of 1987 Conn. Pub. Acts No. 87-133, the Connecticut Insurance Commissioner was granted authority to adopt regulations "to establish standards for insurance policies written on a claims-made basis." Effective May 18, 1987.

3. Until the adoption of 1987 Conn. Pub. Acts No. 87-133 the only standard contained in the Connecticut General Statutes for disapproval of forms for commercial risks was Conn. Gen. Stat. § 38-201c(a) which provides that "[r]ates shall not be *excessive or inadequate* . . . nor shall they be *unfairly discriminatory*." (Emphasis added).

4. The only specific reference to claims-made policies prior to the adoption of 1987 Conn. Pub. Acts No. 87-133 was Conn. Gen. Stat. § 38-370(c) which provides, with respect to *professional liability insurance only*, that:

> Every professional liability insurance policy issued on a claims-made basis delivered, issued for delivery or renewed in this state on or after October 1, 1978, shall contain (1) a provision for the purchase of prior acts coverage and (2) a contractual right of the insured to purchase at any time during the policy period and not later than thirty days after termination of such policy period equivalent coverage for all claims occurring during an insured policy period regardless of when made.

6. The reference by the Defendants to Conn. Ins. Comm. Bull. No. PF-2 (14 and 18) is *plainly* in error. The policy form disapproval list is applicable to *accident and health policies only*. There exists no such disapproval list applicable to CGL forms. The first specific CGL authority with respect to claims-made policies other than professional liability insurance was granted the insurance commissioner by virtue of 1987 Conn. Pub. Acts No. 87-133, effective May 18, 1987 for regulations to be adopted by April 1, 1988. Moreover, *all* P-F bulletins constitute insurance department summaries and/or lists of statutory and/or regulatory criteria. As such, P-F bulletins have no independent force of their own. Moreover, the statutory standards contained in P-F bulletins, by their very terms, are applicable only to *accident* and *health* forms.

D. CONNECTICUT STATUTES PERTAINING TO THE FILING OF RATES DO NOT CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF ADVISORY RATES; NOR DO THEY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF POLICY FORMS.

1. Conn. Gen. Stat § 38-201j(b) provides, *inter alia*, that in order "[t]o obtain and retain a license, a rating organization shall provide satisfactory evidence to the insurance commissioner that it will: . . . (2) neither have nor adopt any rule or exact any agreement, the effect of which would be to require any member or subscriber as a condition to membership or subscribership, to *adhere to its rates, rating plans, rating systems, underwriting rules, or policy or bond forms*; . . . (4) *neither practice nor sanction any plan or act of boycott, coercion or intimidation*, (5) neither enter into nor sanction any contract or act by which any person is restrained from

lawfully engaging in the insurance business; . . . ." (Emphasis added).

E. CONNECTICUT STATUTES DO NOT REGULATE THE ACTIVITIES OF REINSURERS IN ANY MANNER MEANINGFUL TO THE CLAIMS PLEADED IN THE COMPLAINT.

1. Connecticut law provides that no provision of law relative to the form of insurance contracts or policies shall apply to contracts of *reinsurance* unless made *specifically* applicable thereto. Conn. Gen. Stat. § 38-28. Moreover, Connecticut law specifically exempts reinsurance, other than joint reinsurance, to the extent stated in § 38-2011, from all commercial risk insurance rating practices. Conn. Gen. Stat. §§ 38-201(a) to 38-201(s).

2. Conn. Gen. Stat. §§ 38-110, 233 and 452 do not 'regulate' reinsurers' conduct at all. Rather each statute governs an aspect of reinsurance contracts: § 38-452—a reinsurance contract cannot reduce the amount recoverable by the liquidator from reinsurers as a result of delinquency proceedings; § 38-110—reinsurance shall not be included in the amount of total exposure by stock or mutual fire insurance companies to determine ten percent of paid-up capital and surplus (stock), or net surplus and two and a half times its total cash premiums or premium deposits in force (mutual); § 38-233—a domestic society may cede risks to a reinsurer.

F. THE CONNECTICUT UNFAIR INSURANCE PRACTICES ACT (CUIPA) DOES NOT EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE DEVELOPMENT OF POLICY FORMS OR THE USE OF SUCH FORMS.

1. The Connecticut Unfair Insurance Practices Act, Conn. Gen. Stat. §§ 38-60 to 38-64 ("the Act"), is a consumer-oriented statute directed primarily towards deceptive advertising, marketing and claim settlement practices and discrimination. The Act enunciates a general policy prohibiting trade practices which constitute "unfair methods of competition."

2. Contrary to defendants' characterization, the Act does not provide for the "comprehensive regulation of all types of insurance in Connecticut." Rather the Act defines certain conduct (including boycott, coercion and intimidation, Conn. Gen. Stat. § 38-61(4).) to be an unfair method of competition and establishes certain enforcement authority for the insurance commissioner to remedy violations. However, the remedial authority established by the Act is not exclusive; rather, the Act expressly preserves as available remedies all other authority applicable to such conduct:

> No order of the Commissioner under Conn. Gen. Stat. §§ 38-60 to 38-64, inclusive, shall relieve or absolve any person affected by such order from any liability under any other laws of this state. Conn. Gen. Stat. § 38-62(d). See *Mead v. Burns*, 199 Conn. 651, 661, 509 A.2d 11 (1986).

3. To the extent the Act applies to anticompetitive conduct, it enunciates an intention to preserve, not displace competition. Thus, the Act contains no provision that affirmatively expresses as state policy any intent to displace competition in the insurance industry.

G. THE CONNECTICUT INSURANCE COMMISSIONER DID NOT DETERMINE WHETHER DEFENDANTS HAD ENGAGED IN ANTICOMPETITIVE CONDUCT FOR THE PURPOSE OF ELIMINATING CONSUMER-DEMANDED COVERAGES.

1. The Connecticut Commissioner's Notice of Decision dated December 31, 1985 concerning ISO's proposed claims-made form did not address any conduct of the defendants. The Commissioner's decision also expressly did not address the ISO occurrence form which had been

filed contemporaneously with the claims made form. The decision was limited to an evaluation of the claims-made trigger only, and did not address other aspects of the claims-made form such as the pollution exclusion.

2. By virtue of the adoption of 1987 Conn. Pub. Acts No. 87-133, the Connecticut Insurance Commissioner was granted authority to adopt regulations "to establish standards for insurance policies written on a claims-made basis." Effective May 18, 1987.

3. Until the adoption of 1987 Conn. Pub. Acts No. 87-133 the only standard contained in the Connecticut General Statutes for disapproval of forms for commercial risks was Conn. Gen. Stat. § 38-201c(a) which provides that "[r]ates shall not be *excessive or inadequate* . . . nor shall they be *unfairly discriminatory*." (Emphasis added).

4. The only specific reference to claims made policies prior to the adoption of 1987 Conn. Pub. Acts No. 87-133 was Conn. Gen. Stat. § 38-370(c) which provides with respect to *professional liability insurance only*, that:

> Every professional liability insurance policy issued on a claims-made basis delivered, issued for delivery or renewed in this state on or after October 1, 1978 shall contain (1) a provision for the purchase of prior acts coverage and (2) a contractual right of the insured to purchase at any time during the policy period and not later than thirty days after termination of such policy period equivalent coverage for all claims occurring during an insured policy period regardless of when made.

5. Thus, the Insurance Commissioner of Connecticut was without authority, using as his basis Conn. Gen. Stat. § 38-370(c), to disapprove the 1984 CGL Form (GL 84-084(c)) and without authority to supervise review of the Claims-Made Form submitted for his consideration.

* * * *

STATES' REGULATORY APPENDIX
STATE OF MONTANA

A. MONTANA STATUTES EXPRESS AN OVERALL POLICY DISFAVORING COLLUSION AND FAVORING COMPETITION IN THE PROVISION OF INSURANCE COVERAGES.

1. The Montana Insurance Code demonstrates an overall concern that the insurance market in Montana remain competitive. Section 33-18-102(1), MCA, provides that "[n]o person shall engage in this state in any trade practice which is defined in this chapter as or determined pursuant to this chapter to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance."

2. The legislative intent to foster competition in the insurance industry in Montana appears in other areas of the Montana Insurance Code as well. For example, Section 33-18-304, MCA, provides that insurers may acquire capital stock of other insurers or engage in common management of other insurers unless such acquisition, investment, retention or common management "is conducted in a manner which substantially lessens competition generally in the insurance business or tends to create a monopoly therein." Section 33-18-304(1), MCA. This statute also provides that a qualified person may be a director of two or more competing insurers "unless the effect thereof is to lessen substantially competition between insurers generally or tends materially to create a monopoly." Section 33-18-304(2), MCA. Other statutes in the Montana Insurance Code evince a similar legislative intent to foster competition. These include the following:

Section 33-2-1105, MCA:

> (1) The commissioner shall approve any merger or other acquisition of control [of a domestic insurer] unless . . .

(b) the effect of the merger or other acquisition of control would be substantially to lessen competition in insurance in this state or tend to create a monopoly therein.

Section 33-16-201, MCA:

The following standards shall apply to the making and use of rates pertaining to all classes of insurance to which the provisions of this chapter are applicable:

(1)(a) Rates shall not be excessive or inadequate, as herein defined, nor shall they be unfairly discriminatory.

(b) no rate shall be held to be excessive unless such rate is unreasonably high for the insurance provided and a reasonable degree of competition does not exist in the area with respect to the classification to which such rate is applicable.

(c) no rate shall be held to be inadequate . . . unless such rate is unreasonably low for the insurance provided and the use of such rate by the insurer using same has, or if continued will have, the effect of destroying competition or creating a monopoly.

B. MONTANA STATUTES SPECIFICALLY PROHIBIT ACTS AND AGREEMENTS CONSTITUTING BOYCOTT, COERCION, AND INTIMIDATION.

Section 33-18-303, MCA, provides that "[n]o person shall enter into any agreement to commit or by any concerted action commit any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of or monopoly in the business of insurance."

C. MONTANA STATUTES PERTAINING TO THE FILING OF INSURANCE POLICY FORMS DO NOT CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF SUCH FORMS.

1. Montana Code Ann. Section 33-1-501 *et seq.*, establishes general requirements regarding the use of policy forms in Montana. It provides that: "[n]o insurance policy . . . shall be delivered or issued for delivery in this state unless the form has been filed with and approved by the commissioner of this state." Section 33-1-501(1). Forms must be filed not less than sixty days prior to delivery. The Commissioner may "affirmatively approve or disapprove" the forms during the sixty-day period. Section 33-1-501(2).

2. The Commissioner is authorized to disapprove a form if it "contains or incorporates by reference . . . any inconsistent, ambiguous, or misleading clauses or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract," or if it contains a misleading title. Mont. Code Ann. Section 33-1-502(1-4).

3. Neither Sections 33-1-501 *et seq*, nor any other statute clearly articulates and affirmatively expresses any intention to displace competition regarding the availability or use of such forms.

D. MONTANA STATUTES PERTAINING TO THE FILING OF RATES DO NOT CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF ADVISORY RATES; NOR DO MONTANA STATUTES EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF POLICY FORMS.

1. The statement of purpose and intent found at the beginning of Chapter 16, which governs rate-making, provides that:

> It is the express intent of this chapter to permit and encourage competition between insurers on a sound financial basis and nothing in this chapter is intended to give the commissioner power to fix and determine a rate level by classification or otherwise. (emphasis added)

2. Section 33-16-303(1), MCA, contains the following prohibition against anti-competitive conduct:

> Members and subscribers of rating or advisory organizations may use the rates, rating systems, underwriting rules, or policy or bond forms of such organizations, either consistently or intermittently, but, except as provided in Sections 33-16-105, 33-16-302, 33-16-305, 33-16-307, and 33-16-1005 shall not agree with each other or rating organizations or others to adhere thereto.

(Emphasis added).

3. Insurers and rating organizations are required to file rates intended for use in Montana with the Commissioner, and the required filing may be made by a rating organization on behalf of its members and subscribers. However, the right of independent action is guaranteed to individual insurers by Section 33-16-203, MCA, which

provides that a member or subscriber to a rating organization may file any such rates on its own behalf as well.

E. MONTANA STATUTES DO NOT REGULATE REINSURERS IN ANY MANNER MEANINGFUL TO THE CLAIMS PLEADED IN THE COMPLAINT.

1. In Montana, reinsurers (including retrocessional reinsurers) are not subject to rate or form review. Section 33-1-501(6)(a), MCA and Section 33-16-103, MCA. The Montana Insurance Commissioner has no authority to review or regulate the product which reinsurer's sell, its price, or the terms and conditions on which it is sold.

2. Nor are reinsurers subject to licensing requirements, unless they are incorporated in Montana. Section 33-2-102, MCA explicitly exempts reinsurance from those transactions which require a certificate of authority. Although several defendant reinsurers have chosen to become licensed in Montana, they are not required to do so in order to sell reinsurance.

3. Section 33-2-101, MCA, cited by defendants for the proposition that reinsurers "may become subject to regulation under licensing or authorization statutes," simply requires an insurer to obtain a certificate of authority in order to transact insurance in Montana. As noted above, Section 3102, MCA explicitly exempts reinsurance from this requirement.

4. Defendant's reference to Sections 33-2-106, 33-2-109 to 33-2-112 and 33-2-115, MCA (Defendant's State-by-State Appendix at 100) is misleading, since none of those statutes purports to authorize the Commissioner to specifically regulate reinsurance, nor do any of those states require reinsurers to obtain a certificate of authority to conduct reinsurance business in Montana.

5. Sections 33-2-1205, 33-2-1206, 33-2-1211 and 33-2-1212, MCA, regulate the use of reinsurance in certain

instances by primary insurers. These statutes do not regulate reinsurers, as defendants imply. (Defendant's State-by-State Appendix at 100.) In fact, other provisions of the Montana Insurance Code which mention reinsurance are provisions which specifically exempt reinsurance from regulation. Section 33-2-317, MCA, for example, specifically exempts reinsurance from state regulation of surplus lines insurance.

6. None of the above-cited provisions, nor any other statute in Montana, "regulates" reinsurance transactions in the State of Alabama in any manner meaningful to the claims pleaded in the complaints.

F. MONTANA'S UNFAIR PRACTICES CHAPTER OF ITS INSURANCE STATUTES DOES NOT EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE DEVELOPMENT OF POLICY FORMS OR THE USE OF SUCH FORMS.

1. The Montana Unfair Practices Chapter of its insurance code ("the Act") is a consumer-oriented statute directed primarily towards deceptive advertising, marketing and claim settlement practices and discrimination. The Act enunciates a general policy prohibiting trade practices which constitute "an unfair method of competition." Section 33-18-102(1), MCA.

2. Contrary to defendants' characterization, the Act does not provide for the "comprehensive regulation of all types of insurance in Montana." Rather, the Act defines certain conduct (including boycott, coercion, and intimidation) to be an unfair trade practice and establishes certain enforcement authority for the insurance commissioner to remedy these violations. However, the remedial authority established by the Act is not exclusive; rather, the Act expressly preserves as available remedies all other state and federal authority applicable to such conduct.

Section 33-18-1004(4) No order of the commissioner pursuant to this section or order of court to enforce it shall in any way relieve or absolve any person affected by such order from any other liability, penalty, or forfeiture under law.

Section 33-18-1004(5) This section shall not be deemed to affect or prevent the imposition of any penalty provided by this code or by other law for violation of any other provision of this chapter, whether or not any such hearing is called or held or such desist order issued.

Further the administrative rules promulgated by the Commissioner in implementing the enforcement provisions of the unfair trade practices law provide that:

> These rules are not exclusive. . . . The rights provided by these rules are in addition and do not prejudice any other rights the policyholder may have at common law, under statutes or other Administrative Rules of Montana.

Section Section 6.6.2001(3), Administrative Rules of Montana.

G. [Intentionally left blank]

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STATES' REGULATORY APPENDIX
STATE OF NEW YORK

A. NEW YORK STATUTES EXPRESS AN OVERALL POLICY DISFAVORING COLLUSION AND FAVORING COMPETITION IN THE PROVISION OF INSURANCE COVERAGES.

1. New York law pertaining to property and casualty insurance, including CGL insurance, specifically includes, among its purposes, the promotion of "price competition and competitive behavior among insurers . . ." New York Ins. Law 2301.

2. New York law grants a private right of action for treble damages and injunctive relief to "[a]ny person injured in his business or property" by reason of any prohibited anticompetitive conduct in connection with the sales of property/casualty insurance. New York Ins. Law, 2316(b)(2) and (3).

3. The superintendent, through the Attorney General, may also maintain an action to enjoin any such anticompetitive conduct. New York Ins. Law 2316(b)(2). New York law provides for concurrent administrative enforcement of these prohibitions of anticompetitive conduct. *See* New York Ins. Law 2320(c).

B. NEW YORK STATUTES PROHIBITS ACTS AND AGREEMENTS CONSTITUTING BOYCOTT, COERCION AND INTIMIDATION.

Prohibited anticompetitive conduct under New York Ins. Law, 2316(b)(2) and (3), above, includes agreements among insurers or rate service organizations to refuse to deal in connection with the sale of such insurance, agreements or attempts to monopolize, agreements the effect of which may be substantially to lessen competition, and agreements in restraint of trade. New York Ins. Law 2316(a). This language would, of course, prohibit acts constituting boycott, coercion and intimidation.

C. NEW YORK STATUTES PERTAINING TO THE REVIEW OF INSURANCE POLICY FORMS DO NOT CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF SUCH FORMS.

1. New York Ins. Law 2307(b) establishes general requirements regarding the use of policy forms in New York. It provides that "[n]o policy form shall be delivered or issued for delivery unless it has been filed with the superintendent and either he has approved it or thirty

days have elapsed and he has not disapproved it as misleading or violative of public policy."

2. The superintendent may disapprove proposed policy forms if they are "misleading or violative of public policy." Section 2307(b).

3. Policy forms to be used in connection with umbrella and excess liability coverages are generally required to be filed pursuant to Section 2307(b) only when written by insurers licensed in New York. Under New York law, such coverages, as well as other commercial liability coverages, may be sold by insurers not licensed in New York when such coverages are unobtainable in whole or in part from insurers licensed in New York. 11 New York Code Rule and Regulations § 27.0(a) (Regulation 41); New York Ins. Law ¶ 2118. Policy forms used or rates charged in connection with such coverages when written by non-licensed insurers are generally not subject to filing with or review by state insurance officials.

D. NEW YORK STATUTES PERTAINING TO THE FILING OF RATES DO NOT CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF ADVISORY RATES; NOR DO THEY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF POLICY FORMS.

1. New York law permits the operation of rate service organizations. New York Ins. Law § 2313(a). A rate service organization is defined, in pertinent part, as a "person or . . . entity which makes or files rates as permitted by this article, or which assists insurers in rate making or filing by collecting, compiling, and furnishing loss or expense statistics, or by recommending rates or rate information. . . It shall include a person or entity

which prepares and files policy forms and endorsements on behalf of insurers." *Id.*

2. New York law also permits "[c]ooperation among rate service organizations or among rate service organizations and insurers in rate making or in other matters within the scope of this article", including form-making, "provided that the filing resulting from such cooperation is subject to all the provisions of this article which are applicable to filings generally." New York Ins. Law § 2313(O).

3. Nothing contained in relevant New York law requires "any insurer to become a member of or a subscriber to any rate service organization," or prevents "any insurer, while a member of or subscriber to a rate service organization, from making it's own rates for any kind, subdivision or class of insurance, for which it does not elect to authorize the rate service organization to act on its own behalf." New York Ins. Law § 2316(a). Moreover, under New York Law, "[n]o rate service organization shall have authority to act on behalf of any insurer which is a member of or subscriber to such rate service organization," except as authorized in writing by such member of subscriber to do so. New York Ins. Law § 2316(a)(10). Such authority may be "supplemented, modified or revoked, in whole or in part, at any time by such member or subscriber at its option." *Id.*

4. New York law prohibits any insurer or rate service organization from making "any agreement with any other insurer or rate service organization to refuse to deal with any person in connection with the sale of insurance." New York Ins. Law, § 2316(a)(6).

5. New York law also prohibits any rate service organization or member or subscriber thereof from interfering "with the right of any insurer to make its rates independently of such rate service organization or to

charge rates different from the rates made by such rate service organization." New York Ins. Law, § 2316(a)(7).

6. New York law also forbids any rate service organization to "have or adopt any rule, or enact any agreement, or formulate or engage in any program, the effect of which would be to require any member, subscriber or other insurer to utilize some or all of its ratings service, or to adhere to its rates, rating plans, rating systems, underwriting rules, or policy forms, or to prevent any insurer from acting independently." New York Ins. Law, § 2316(a)(11).

E. NEW YORK STATUTES DO NOT REGULATE THE ACTIVITIES OF REINSURERS IN ANY MANNER MEANINGFUL TO THE CLAIM PLEADED IN THE COMPLAINT.

1. Article 23 of the New York Insurance Law applies generally to property/casualty insurance written on risks or operations in New York by an insurer authorized to do business in New York. New York Ins. Law § 2302(a). Reinsurance, with exceptions not relevant here, is specifically exempted from Article 23's statutory scheme relating to direct property/casualty insurance. New York Ins. Law, § 2302(a)(1). Accordingly, under New York law, policy forms used or rates charged in connection with reinsurance coverages for commercial liability risks are generally not subject to prior filing with or review by state insurance officials.

2. New York law provides that "[n]o person, firm, association, corporation or joint-stock company shall do an insurance business in this state unless authorized by a license in force pursuant to the provisions of this chapter. . . New York Ins. Law 1102(a) "Doing an insurance business" is defined to include the doing of any "reinsurance business." New York Ins. Law 1101(b)(1)(d). However, New York law also provides that the reinsurance of risks of authorized insurers, if effected

by mail from outside New York by an unauthorized foreign or alien insurer licensed under the laws of its domicile, shall not constitute doing an insurance business in New York. New York Ins. Law 1101(b)(2)(0).

3. Underwriters at Lloyd's of London, including defendants Merrett Underwriting Agency Management Limited (s/h/a Merrett Underwriting Agencies Mgt., Ltd.), Three Quays Underwriting Management Limited (s/h/a Three Quays Underwriting, Ltd.), Janson Green Management Limited (s/h/a Janson Green, Ltd.), (C.J.W.) (Underwriting Agencies) Limited (s/h/a C.J. Warrilow-Hine & Butcher, Ltd.), Murray Lawrence & Partners), Edwards & Payne (Underwriting Agencies) Limited (s/h/a Edwards and Payne Management (U.A.), Ltd.), Oxford Syndicate Management Ltd. (s/h/a K.F. Alder & Others, (U.A.) Ltd.), and D.P. Mann Underwriting Agency Limited (s/h/a D.P. Mann & Others (U.A.), Ltd.), are not currently and at all relevant times were not licensed or authorized to do any insurance business in New York.

Defendant Unionamerica Insurance Company, Ltd. is not currently and at all relevant times was not licensed or authorized to do any business in New York.

Defendant Nova Insurance Company, Ltd., is not currently and at all relevant times was not licensed or authorized to do any insurance business in New York.

Defendant Excess Insurance Company, Ltd., s/h/a Excess Insurance Group, Ltd., is not currently and at all relevant times was not licensed or authorized to do any insurance business in New York.

Defendant Kemper Reinsurance London, Ltd. is not currently and at all relevant times was not licensed or authorized to do any insurance business in New York

Defendant Continental Reinsurance (Corporation (U.K.) is not currently and at all relevant times was not licensed or authorized to do any insurance business in New York.

Defendants CNA Re (U.K.), Ltd. is not currently and at all relevant times was not licensed or authorized to do any insurance business in New York.

4. Non-licensed reinsurers may qualify as "accredited reinsurers" if they are in compliance with solvency standards and other applicable regulation. New York Ins. Law § 107(a)(2) provides that reinsurance obligations of such accredited reinsurers to primary insurers are generally deemed to be assets of primary insurers for purpose of detemining the solvency and financial condition of such primary insurers. New York Ins. Law ¶ 1301(a)(14).

F. NEW YORK'S UNFAIR METHODS OF COMPETITION AND UNFAIR AND DECEPTIVE ACTS AND PRACTICES ACT DOES NOT EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE DEVELOPMENT OF POLICY FORMS OR THE USE OF SUCH FORMS.

1. Article 24 of the New York Insurance Law is intended (1) to define or provide for the determination of all trade practices in the business of insurance "which constitute unfair methods of competition or unfair or deceptive acts or practices", and (2) to prohibit such practices.

2. Article 24 provides that "[n]o person shall engage in this state in any trade practice constituting a defined violation or a determinated violation as defined herein." New York Ins. Law § 2403. "Person" is defined in pertinent part as "any legal entity subject to any provision of this chapter, engaged in the business of insurance in this state. . ." New York Ins. Law § 2402(a). Article 24 further provides that "[n]o order of the superintendent

[regarding any trade practice constituting a defined or a determined violation] or order of a court to enforce the same shall in any way relieve any person affected by the order from any liability under any other law." New York Ins. Law § 2409(b).

G. THE NEW YORK DEPARTMENT OF INSURANCE DID NOT DETERMINE WHETHER DEFENDANTS HAD ENGAGED IN ANTICOMPETITIVE CONDUCT FOR THE PURPOSE OF ELIMINATING COVERAGES FOR CONSUMER-DEMANDED COVERAGES.

1. ISO's claims-made and occurrence policy forms were initially filed with the New York State Insurance Department on March 13, 1984. Amendments to the policy forms, including the insertion of a retroactive date provision in the claims-made form, and the elimination of virtually all pollution coverage from both forms, were filed on, among other dates, December 5, 1984, and February 14, 1985.

2. On October 11, 1985, the New York Superintendent of Insurance disapproved ISO's claims-made CGL policy form on the grounds that "(a) it would be misleading to insurers and the public, and (b) its widespread use in the standard CGL policy form would be violative of public policy." Opinion and Decision dated October 11, 1985. By letter dated March 21, 1985, (Exhibit 121 to defendants' State-by-State Appendix), the Superintendent approved ISO's occurrence CGL policy form as re-submitted by ISO under cover of a letter dated March 17, 1986 (Exhibit 120 to defendants' State-by-State Appendix).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C-88-1688-WWS
(All Cases)

IN RE INSURANCE ANTITRUST LITIGATION

MEMORANDUM IN SUPPORT OF MOTION OF PLAINTIFF STATES TO VACATE JUDGMENT, OR IN THE ALTERNATIVE TO ALTER JUDGMENT TO GRANT LEAVE TO REPLEAD, OR IN THE ALTERNATIVE TO VACATE JUDGMENT TO PERMIT DISCOVERY

[Filed Oct. 5, 1989]

[Memorandum omitted]

ATTACHMENT A

PROFFERED FACTS

If granted leave to amend, the States would add, among others, the allegations described in the following synopsis.

I. *Property Pollution and Casualty Pollution Markets Are Interrelated*

(*See* Order at 40, lines 21-23)

A. Insurers and reinsurers that write casualty insurance or reinsurance also write property insurance or reinsurance.

B. Once defendants successfully eliminated pollution coverage from casualty insurance markets, the likelihood existed that pollution damage and injury claims would be shifted instead to property policies containing pollution coverage.

C. Consequently, defendants' conspiracy to eliminate all pollution insurance products would not succeed unless property pollution products, as well as casualty pollution products, were eliminated.

II. *Withdrawal of ISO Support for 1973 ISO CGL Forms*

(*See* Order at 25, lines 17-20.)

A. In furtherance of the conspiratorial goal of eliminating pollution and other long tail risk products from the market, insurer members of certain influential ISO committees, including defendants Aetna, CIGNA and Hartford, agreed to withdraw all support for the 1973 CGL form and to boycott insurers that needed the support in order to continue to offer products written on those forms.

B. ISO support was and is essential for the vast majority of insurers to continue to offer products written on the 1973 form.

C. On July 1, 1987, pursuant to this agreement, ISO officially withdrew its support of the 1973 CGL form.

D. Many insurance consumers preferred the products provided in the 1973 CGL form at the time support was discontinued, and actively resisted the withdrawal of such products.

E. The 1973 form has been, and continues to be, approved or accepted for use in various states.

F. Insurers other than defendants wanted to provide to consumers the products embodied in the 1973 forms. Defendants' support withdrawal, however, has prevented insurers from offering those products and has severely limited or eliminated those products from insurance markets.

III. *Boycott Allegations*

(*See* Order at 10, lines 6-7, 11, lines 3-4)

Defendants' conduct alleged in the Sixth and Seventh Claims for Relief in the First Wave Complaints and Fourth and Sixth Claims for Relief in the Second Wave Complaints constitute agreements or acts of boycott, coercion or intimidation or both.

IV. *Economic Motivation of Defendants*

A. Both primary insurers and reinsurers had economic motivations for engaging in the acts of boycott, coercion, or intimidation that are alleged in the complaints.

B. Defendant primary insurers engaged in such acts and entered into such agreements because, had they not done so, their rivals would have used the boycotted products as "door openers" to lure away customers. By forcing a market-wide elimination of the boycotted products, the defendant insurers were able to cease offering the products without risk of losing market share to firms that continued to offer them.

C. Defendant reinsurers engaged in such acts and entered into such agreements because doing so enabled them to prevent insurers from offering the boycotted products. Competition among reinsurers to provide reinsurance for insurers that wanted to offer the boycotted products was effectively eliminated.

V. *Comity Factors*

(*See* Order at 47-55)

A. Various defendants, although based in London, are owned and controlled, in whole or by majority interest, by United States corporations.

1. Defendants Terra Nova Insurance Co., Ltd.; Excess Insurance Company Limited; CNA Re (U.K.), Ltd.;, Kemper Re (U.K), Ltd.; Unionamerica Insurance Co., Ltd. and Continental Reinsurance Co. (U.K.), Ltd. all are owned and controlled by United States corporations, including defendants Aetna and CIGNA, and the parent corporation of defendant Hartford.

B. Substantially all of the effects alleged in the complaint occurred principally or exclusively in the United States.

C. Each defendant named in the Second, Third and Fourth claims for relief in the Second Wave (Connecticut-style) complaints, and in the First through Sixth Claims for Relief in the First Wave (California-style) complaints, intended by its anticompetitive actions to harm or affect, and in fact did harm and affect, United States commerce.

D. Lloyd's syndicates participate actively in the American economy, and their activities have a significant effect on United States commerce.

1. United States risks comprise the vast majority of the Lloyd's market for North American risks.

2. The United States market is the largest market for Lloyd's, and is almost double the size of any other Lloyd's market.

3. Approximately half of Lloyd's casualty business is written on United States risks.

4. Lloyd's is the largest reinsurer of United States business.

5. Lloyd's maintains a trust fund of at least \$9,400,000,000 in the United States.

E. The London defendants engaged in numerous acts in the United States that were critical to the success of the boycotts, including private meetings with other defendants and public appearances in various forums to convey the threat of a reinsurance boycott unless consumer-demanded coverages were eliminated.

F. Eliminating the anticompetitive activity alleged in the complaints from Lloyd's and the London Company Market will not disrupt operations in those markets.

6. Both operate on the principle of free competition.

7. Neither market customarily condones boycotts.

8. Advance agreements among reinsurers binding them to underwrite only on specified terms, or to refuse to underwrite at all, without room for contrary individual decisions, is inconsistent with the custom and practice in both markets.

G. In both Lloyd's and in the London Company Market, ultimate reinsurance decisions are customarily made by individual underwriters responding to the circumstances of an individual transaction. Such decisions customarily are not imposed by market-wide agreements which divest individual underwriters of independent discretion.

VI. *Collective Forms Development Is Independent of Individual Underwriting Decisions.*

(*See* Order at 26, lines 12-14)

Participation in collective forms development does not imply that participants would also reach agreements on what coverage products each would offer in the market. Insurers responding to competitive forces often will offer coverage products that are not included in standard forms, provided that they are not denied access to reinsurance for such products or other essential services necessary to offer such products effectively.

VII. *Product Definitions*

A. Coverage for pollution liability is a product separate and distinct from coverage for other forms of liability. Coverage for other forms of liability is not a substitute for coverage for pollution.

B. Each coverage component of CGL coverage is a product separate and distinct from other coverage components.

C. Occurrence coverage and claims-made coverage are different products. Claims-made coverage is not a substitute for occurrence coverage because it does not supply any tail coverage, the most valuable component of occurrence coverage.

VIII. *Occurrence Boycott*

A. Insurers other than defendants wanted to continue to offer occurrence CGL products to consumers.

B. Defendants' collusive withdrawal of reinsurance for occurrence coverage was intended to prevent primary insurers from offering occurrence coverage to consumers.

1976 No. 98

FAIR TRADING

The Restrictive Trade Practices (Services) Order 1976

Laid before Parliament in draft

Made — — — — 26th January 1976

Coming into Operation 22nd March 1976

Whereas a notice has been published by the Secretary of State complying with the terms of section 111(2) of the Fair Trading Act 1973 [a] (hereinafter referred to as "the Act of 1973") and all the representations made with respect thereto have been taken into consideration:

And whereas a draft of this Order has been laid before Parliament and approved by resolution of each House of Parliament:

Now, therefore, the Secretary of State in exercise of powers conferred on her by sections 107 and 110 of the Act of 1973 hereby makes the following Order:—

1.—(1) This Order may be cited as the Restrictive Trade Practices (Services) Order 1976 and shall come into operation on 22nd March 1976.

(2) The Interpretation Act of 1889 [b] shall apply for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

2.—(1) The services brought under control by this Order are all services without exception.

(2) The services described in this Order as designated services are all services except those described in Schedule 4 to the Act of 1973.

[a] 1973 c. 41.

[b] 1889 c. 63.

3.—(1) It is directed that, subject to the provisions of Part X of the Act of 1973, the agreements to which Part I of the Restrictive Trade Practices Act 1956 [c] applies shall include agreements (whether made before or after the passing of the Act of 1973 and whether before or after the making of this Order) which—

(a) are agreements between two or more persons carrying on business within the United Kingdom in the supply of services brought under control by this Order, or between two or more such persons together with one or more parties, and

(b) are agreements under which restrictions, in respect of the matters specified in paragraph (2) below for the purposes of section 107(1)(*b*) of the Act of 1973, are accepted by two or more parties, and

(c) are not agreements described in the Schedule hereto.

(2) The matters specified for the purposes of the said section 107(1)(*b*) are the following, that is to say—

(a) the charges to be made, quoted or paid for designated services supplied, offered or obtained:

(b) the terms or conditions on or subject to which designated services are to be supplied or obtained;

(c) the extent (if any) to which, or the scale (if any) on which, designated services are to be made available, supplied or obtained;

(d) the form or manner in which designated services are to be made available, supplied or obtained;

(e) the persons or classes of persons for whom or from whom, or the areas or places in or from

[c] 1956 c. 68.

which, designated services are to be made available or supplied or are to be obtained.

Alan Williams,
Minister of State,
Department of Prices and Consumer Protection.

26th January 1976.

SCHEDULE

1. For the purposes of determining whether any agreement to which such an association as is mentioned in section 112 of the Act of 1973 is a party falls within a paragraph of this Schedule—

(a) if the association does not carry on business in the supply of the relevant service or belong to the relevant class of persons, but represents persons who do, it shall be deemed to carry on such a business or belong to that class; and

(b) there shall be disregarded any person who does not carry on the relevant business or belong to the relevant class and who is a party to the agreement by virtue only of the operation of that section.

2.(1) An agreement to which the only parties are operators of international sea transport services and the only restrictions accepted thereunder are in respect of such services.

(2) An agreement to which the only parties are such operators and persons for whom such services are being supplied and the only restrictions accepted thereunder are in respect of such services so far as those services relate to goods.

(3) An agreement to which the only parties are operators of international sea transport services and one other person carrying on business in the supply of another service and the only restrictions accepted under the agreement relate to the supply or acquisition of that other service in connection with the operation of international sea transport services.

(4) In this paragraph "international sea transport services" means the international carriage of passengers or goods wholly or partly by sea; and where the carriage is not wholly by sea, the carriage by sea and the carriage otherwise than by sea form part of the same service.

3.—(1) An agreement to which the only parties are air transport undertakings and the only restrictions accepted thereunder are in respect of carriage by air.

(2) An agreement entered into between an air transport undertaking and its agent and the only restrictions accepted thereunder are accepted in pursuance of such an agreement as is described in (1) above.

(3) In this paragraph "air transport undertaking" shall have the same meaning as in the Air Navigation Order 1974 [a].

4.—(1) An agreement to which the only parties are road passenger transport operators, and the only restrictions accepted thereunder relate to the provision of stage carriages or express carriages or both.

(2) For the purposes of this paragraph "stage carriage" and "express carriage" shall have the meaning given those expressions by sections 117 and 118 of the Road Traffic Act 1960 [b].

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[a] S.I. 1974/1114 (1974 II, p. 4057).

[b] 1960 c. 16.

5.—(1) An agreement entered into between the Treasury or both the Treasury and the Secretary of State and building societies and the only restrictions accepted thereunder relate to the raising of funds or the making of loans.

(2) An agreement to which the only parties are building societies and the only restrictions accepted thereunder are accepted in pursuance of such an agreement as is described in (1) above.

(3) An agreement to which the only parties are building societies, and the only restrictions accepted thereunder relate to the rates of interest charged or to be charged for loans, or to the rates of interest paid or to be paid to shareholders or depositors.

(4) In this paragraph a "building society" means a society incorporated under the Building Societies Act 1962 [e] or any enactment repealed by that Act (and includes a Northern Ireland society defined in section 134 of that Act).

6. An agreement to which the Bank of England or the Treasury or both the parties and which relates exclusively to the exercise of control by the Bank of England and the Treasury or one of them, as the case may be, over financial institutions or over the monetary system generally, or to the conduct of markets in money, in public sector debt instruments or in foreign currencies.

7. An agreement to which the only parties carry on business in the supply of banking services and the only restrictions accepted thereunder relate to the supply of such services in Northern Ireland, or in Northern Ireland and the Republic of Ireland.

(e) 1962 c. 37.

8. An agreement to which the only parties are persons permitted by or under Part I of the Insurance Companies Act 1974 [a] or Part II of the Insurance Companies Act (Northern Ireland) 1968 [b] to carry on Insurance business and the only restrictions accepted thereunder relate to the provisions of insurance services.

9. An agreement to which the only parties are trustees or managers of unit trust schemes authorised under the provisions of the Prevention of Fraud (Investments) Act 1958 [c], or of the Prevention of Fraud (Investments) Act (Northern Ireland) 1940 [d], and the only restrictions accepted thereunder relate to the management of, or the sale and purchase of units of, unit trust schemes authorized as aforesaid.

10. An agreement arising by virtue of a recommendation made by an association such as is described in section 112(1) of the Act of 1973 and which is either represented on the body known as the Panel on Take-overs and Mergers or is a member of such an association represented thereon, being a recommendation to comply with the provisions of the City Code on Take-overs and Mergers or a recommendation made for the purpose of Implementing a decision of the Panel.

(a) 1974 c. 49.

(b) 1968 c. 6(NI).

(c) 1958 c. 45.

(d) 1940 c. 9(NI).

PARLIAMENTARY DEBATE

973 Parl. Deb. H.C.
(5th ser.) 1354
(Nov. 15, 1979)

ORDERS OF THE DAY

PROTECTION OF TRADING INTERESTS BILL

Order for Second Reading read.

4.43 pm

The Secretary of State for Trade (Mr. John Nott): I beg to move, That the Bill be now read a Second time.

I am moving today the Second Reading of a Bill which deals with matters vital to the interests of the United Kingdom as an international trading nation. While I hope that it will command general support, I recognise that the Bill in some respects breaks fresh legal ground. I hope that I shall be able to persuade the House that it is justified. In view of the complicated nature of and the particular background to the Bill, I fear that I shall have to delay the House for rather longer than I would wish. It is, however, important that I set out the full facts underlying this proposed new piece of legislation.

My objective in introducing this Bill is to reassert and reinforce the defenses of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us. From our point of view, the most objectionable method by which this is done is by the extra-territorial application of domestic law. In theory this is a general problem, since many countries have policies which, given the occasion and the inclination, they might seek to enforce on persons located, or engaged in activities, beyond the normal bounds of national jurisdiction as recognized in international law.

In effect, however, the practices to which successive United Kingdom Governments have taken exception have arisen in the case of the United States of America. We have not suddenly become belligerent or confrontational in regard to this most powerful and valued friend. The Bill is a response to a sitaution of a very particular nature which has been developing over several decades and which in the past few years has become much more acute. It also emphasises that, in so far as the application or enforcement of any foreign law requires the active assistance or passive acquiescence of the United Kingdom the overseas country in question must have regard to the trading interests of the United Kingdom.

The Government recognise that the United Kingdom bears a heavy responsibility in the maintenance of the open international trading system in what is, nevertheless, an increasingly interdependent trading world. We have to maintain the principle of enterprise and competition between undertakings within individual nations and between trading nations themselves. At the same time, the increasing volume of international trade, the swiftness of modern communications, the international nature of many enterprises and increasing specialization on the part of industrial nations means that, while trading nations are interdependent in a real sense, their economic and commercial policies are bound sometimes to come into conflict. We recognise this, and we believe that the right way to sort out the resulting differences of policy and approach is by intergovernmental discussion and negotiation through the established international organisations by which trade policy is coordinated multilaterally, as well as in bilateral contacts and negotiations between Governments.

I have to say that the United States has shown a tendency in certain respects over the past three decades increasingly to try to mould the international economic and trading world in its own image. There are certain

well-established and deeply held principles in United States economic thought and law which, no doubt from the best motives, the United States seeks to have observed by its trading partners elsewhere in the world. This attitude is shared by the United States legislature, its courts and its enforcement agencies, all of which have contributed to the situation to which we object. Preeminently this arises in the field of anti-trust, or competition, law, and accordingly much of my speech will be devoted to that subject. But, as I shall explain later, there are many other areas in which the United States seeks to impose its own law or concept of good practice on those who do business with it, and even on those who do not do so in any direct sense.

The basic anti-trust law is the Sherman Act, which was passed in 1890. The wording of the Act outlaws restraints of trade in very general terms.

In the first United States Supreme Court case in 1909 involving the extra-territorial reach of the United States anti-trust laws, the court spoke of the general and almost universal rule that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act was done. It stated that all legislation was prima facie territorial, and that it would be an interference with the authority of another sovereign, and contrary to the comity of nations, for a nation to apply its own laws to acts done outside its jurisdiction. This was a clear expression of the territorial principle of national jurisdiction which we in the United Kingdom still observe.

However, by 1945 the United States courts had changed the situation drastically. In a case involving a Canadian and five European aluminum producers who joined together to allocate the amount of aluminum to be produced, the United States alleged that there had been an effect on the price of aluminum in the United States of America. In giving judgment, the court stated that

> "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends".

The court found the agreement between those non-United States companies, which was an action performed entirely outside the United States of America, to be illegal under the Sherman Act and punishable according to the provisions of that law.

Since that time this so-called "effects doctrine" has been applied and extended by the United States courts and regulatory agencies. Furthermore, in applying this doctrine the United States courts have paid comparatively little attention to the interests and policies of foreign Governments where these have been in conflict with those of the United States. Even if they had done so, it would, in my view, be fundamentally unsatisfactory for United States law unilaterally to pass judgment on economic problems which by their very nature are of concern to more than one country. The wide extent and fundamental uncertainty of this claimed reach of United States law through this pernicious extra-territorial effects doctrine has created uncertainty for international industry in this country and elsewhere. The views which I express on this subject are not held just by our Government: they are held and deeply felt in Canada, Australia, South Africa and other countries of the EEC.

However, we have further objections beyond this to the impact of the anti-trust laws on our international trade. Not only are they enforced by criminal sanctions in proceedings initiated by an enforcement agency, but they confer a civil right to triple damages on parties injured by acts unlawful under them. We regard this civil sanction—I refer here to triple damages—as being penal rather than compensatory, and consequently we consider that in international dealings at least these proceedings should be subject to the limitations that we would regard

as appropriate to criminal proceedings. In fact, they are subject to no such limitations. The plaintiff is given what appear to us to be unfair advantage. The defendant need not be present in the United States in order for the proceedings to be brought and heard there; whether or not he appears, he is subject to discovery; and failure to appear is deemed to be an admission of guilt. Furthermore, the United States system of class actions and the so-called "contingency fee" method of payment to lawyers combine to prejudice the defendants. Contingency fees encourage lawyers to invest their time and expertise in stimulating litigation by identifying potentially successful plaintiffs and prosecuting their cases for all they are worth.

As a matter of public policy in this country, we have always opposed the contingency fee system on the ground that it increases the partiality of the lawyer representing one party. Further, the consequences of such a system are exacerbated by the procedure of class actions. While the class action itself may be a sensible way of determining the rights of a large number of people in the same position, in practice the larger the class of plaintiffs involved, the greater the source of potential profit to the litigation lawyers.

The penalties that may be exacted in such civil antitrust proceedings are often wholly disproportionate, particularly since the government may either have brought criminal proceedings already or, for good reasons, rejected that option.

Indeed, the nature of the penal element in civil damages seems to come perilously near to being in conflict with the Bill of Rights 1689, which said:

> "That excessive bail ought not to be required nor excessive fines imposed nor cruel and unusual punishments inflicted."

The eighth amendment to the constitution of the United States, passed in the United States Bill of Rights in 1791,

includes expressions from our Bill of Rights. It is therefore widely felt that penal and exorbitant damages—triple damages—are possibly equivalent to "excessive fines" as set down in the Bill of Rights.

The second area in which difficulties arise is the powers possessed by many agencies in their execution of the duties laid on them by the United States Congress. Those powers may lead them on occasion to pursue inquiries or launch proceedings against persons, who, according to our view of international law, are outside the jurisdiction of the United States. Successive Governments have been obliged to intervene in such cases on behalf of our traders. These agencies include the Federal Trade Commission, the Securities and Exchange Commission, the Federal Maritime Commission, the Commodity Futures Trading Commission, and others.

The third objectionable practice on the part of the United States is that from time to time it treats foreign subsidiaries of United States companies, or even companies in which United States citizens hold a number of shares, though not enough to make the companies subsidiaries of United States companies, as being for that reason subject to United States jurisdiction. Such companies may be required to behave in certain ways, including providing information for the purposes of United States domestic regulatory agencies.

That means that in furtherance of a United States Government policy, which may or may not be shared by other countries, companies domiciled and operating outside the United States, under the laws of other countries, are required to take actions which can and do have a direct bearing on their commercial well-being and on the jobs of, for example, British citizens who work for them in this country. No British Government can accept that British jobs should be harmfully affected by such legislative actions of the United States Congress or enforcement actions of United States Government agencies.

This is not my normal sort of speech. I hope that hon. Members will give me the benefit of any doubt. We are engaged in a delicate and complicated legal matter. I have written down my words and am choosing them with great care.

Mr. John Prescott (Kingston upon Hull, East): I have sympathy with the Secretary of State's argument that it is a legal matter, but I hope that he will address himself to the arguments of economics and competition.

Mr. Nott: I have explained at length why we object to certain of the practices of the United States in the legal and economic field. I hope that I have made it clear that while to the casual observer it may not appear a matter of special importance that such and such a company is involved in a United States anti-trust inquiry, or is subject to investigation by some other agency of the United States government, real issues of national interest are involved for us. The issues are not theoretical or merely of interest to lawyers. I will give an example that will interest the hon. Member for Kingston upon Hull, East (Mr. Prescott).

Last June, a United States grand jury handed down criminal indictments against several shipping companies and individuals, including two consortia in which there is a substantial British element—Cunard and Bibby Lines—and two British nationals. The indictments alleged that the consortia had violated United States anti-trust legislation by establishing rates without the approval of the relevant United States regulatory authority, the Federal Maritime Commission. The Government reacted strongly against the handing down of these indictments, as did the previous Administration to the institution of the grand jury investigation itself. The policy of the British Government, along with that of all European Governments, has been to avoid detailed regulatory intervention in the commercial aspects of international shipping. We believe that to be the best way of achieving efficient and

effective shipping services and protecting the interest of the consumer.

There is the important point, too, that shipping is an international business. Once one starts regulating other than on an agreed basis, many jurisdictional problems can arise. Our own restrictive practices legislation reflects the policy that I have described.

In reference to this case, a senior official of the United States Department of Justice recently recalled that fines of over $6 million were imposed—the largest in the history of the Sherman Act. That was against our shipping companies. He continued that this upward trend was continuing and that, indeed, the antitrust division might well be on its way to becoming a "profit centre" for the Department of Justice. I think that we can draw our own conclusions from that attitude.

Mr. Eric Ogden (Liverpool, West Derby): Presumably, the Secretary of State is not saying that he is against profit.

Mr. Nott: I do not think that the High Court of Justice and the Court of Appeal would consider themselves as profit centres. Generally I like a profit motive to be available, at least to business men, but that is a different matter from seeking to make the Department of Justice a profit centre.

The shipping companies decided to plead "no contest", because of the great cost of litigation in cash and managerial time, and so the case against them was not proved in court. Nevertheless, the highest possible fines were still imposed. Those companies now also face the threat of further proceedings and more sizeable fines by the Federal Maritime Commission for effectively the same offenses. On top of that, civil triple damage proceedings have been commenced against them in which the claims may be over $1.5 billion in triple damage suits.

Such claims are no mere bogy. Some United States paper producers have recently paid $500 million in fines and damages as a result of anti-trust proceedings. The consequences for the shipping companies are potentially financially crippling. No Government can stand by and allow a vital industry to be threatened in that way when we contest the very basis of the United States action.

In another triple damage anti-trust case currently going on in the United States of America, where total damages of up to $6 billion are being claimed, yet another major United Kingdom company—Rio Tinto-Zinc—is at risk. The background to the case is worth explaining.

In 1964, when the United States uranium mining industry was threatened by foreign imports, it was afforded long-term protection by means of an effective United States Government ban on the import of uranium for use in United States reactors. At a stroke that denied to the non-United States producers about three-quarters of the world market for uranium. During the late 1960s and early 1970s, Westinghouse, which is the United States of America's biggest power engineering company, concluded a number of contracts relating to the construction of nuclear power stations in which it agreed to supply future quantities of uranium but failed to take the precaution of buying forward to cover its commitments.

In the meantime, the uranium producers outside the United States of America had, with the positive encouragement of Governments involved, taken some action to protect their markets outside the United States of America in the light of the United States ban and the generally depressed market conditions, which it aggravated.

Following a large and unexpected increase in the price of uranium after 1973, Westinghouse found itself in serious difficulties. In September 1975, it gave notice that its uranium supply contracts had become "commercially impracticable". It blamed the large oil price rise in 1973 and claimed that the cause was the

> "actions of foreign uranium producing countries and companies that have significantly curtailed international uranium supplies".

This led to Westinghouse being sued by the public power utilities. The total amount of compensation claimed was about $2 billion. Westinghouse took this figure as the basis for a triple damage anti-trust claim against the uranium producers. I note that Westinghouse had not included amongst the defendants the French producers that were involved. I cannot regard that as an accident, in view of Westinghouse's interests in France.

The case is still going on, but nine of the foreign defendants, including RTZ, have not accepted that the United States court has jurisdiction and have not appeared. Westinghouse is trying to recover damages from those foreign companies even before a trial on the merits has been heard. That is not scheduled to take place until 1981.

The actions of the non-United States uranium producers reflected policies of the Governments of the uranium-producing countries involved and were a direct result of the earlier United States protectionist embargo. Even the United States Government, despite their general claims to extra-territorial jurisdiction, decided to take only the most modest proceedings against one United States company in this case.

Why, then, should a United States company be able to drag foreign companies, including one of our leading companies, before a United States court in order to obtain massive damages for activities by non-United States companies outside the United States at a time when they were even denied access to the United States market?

I could give further examples of how various regulatory agencies in the United States are attempting to extend

their reach to companies located outside the United States of America. The SEC and the Commodity Futures Trading Commission are both making moves to extend the reach of their jurisdiction beyond the United States, and Congress has recently passed legislation dealing with rebating in the shipping industry, which is legal in Europe but outlawed by the Federal Maritime Commission. Penalties could involve port closure for particular shipping lines.

I must emphasise that we do not dispute the right of the United States or any other nation to pass and enforce what economic laws it likes to govern business operating fully in its own country. Our objection arises only at the point when a country attempts to achieve the maximum beneficial regulation of its own economic environment by ensuring that all those having any contract with it abide by its laws and legal principles.

In other words, there is an attempt to export economic policy and law to persons domiciled in countries that may have different legal systems and priorities without recognising that those countries have the right to lay down the standards to be observed by those trading within their jurisdiction.

Mr. Clinton Davis (Hackney, Central): How does the right hon. Gentleman view the American anti-Arab boycott legislation? Does he feel that it is an example of the extra-territorial jurisdiction of which he complains? It is clearly a matter with wide international ramifications.

Mr. Nott: The answer to the question is "Yes". I consider that the United States anti-boycott legislation comes within the area that I am describing. I do not think that I need to go further.

Mr. Peter Emery (Honiton): Can my right hon. Friend assure the House, in view of the peculiar nature of the legislation, which is obvious from my right hon. Friend's speech, that all diplomatic channels and negotiations have been carried through between the British and American Governments in order to try to overcome the problems and to avoid the necessity of the Bill being produced?

I am sure that the answer must be "Yes", but it is important that that should be spelt out so that those coming to grips with the legislation may understand that successive British Governments have done everything possible to rectify the situation by normal negotiations.

Mr. Nott: The right hon. Member for Lanarkshire, North (Mr. Smith) and the hon. Member for Hackney, Central (Mr. Davis) will confirm that we have several decades of diplomatic representation on this subject behind us, as have most other Western countries. It is not just us who are offended by the extra-territorial jurisdiction claimed by the United States under the effects doctrine which came rather late into the Sherman Act proceedings.

Since the Government came to power, I have made diplomatic representations on the shipping case and the Government have been involved in the uranium case. The only aspect of the Bill that we have not debated in full with the United States authorities is clause 6, which involves the recovery of triple damage suits in this country.

Since we published the Bill, the United States ambassador has seen me and made certain representations and I have given him a response. Apart from that, the general underlying seriousness of the British Government's view towards triple damage suits and the extra-territorial reach of the United States has been a matter of diplomatic representations by successive Administrations over the years, but it has achieved nothing to speak of.

Voices are continually being raised in the United States against trends in that country. Last month, Mr. George

Ball, former Under-Secretary of State and former permanent representative at the United Nations, who is well known to the House, said that during his years in the State Department he had encountered no set of problems that evoked greater frustration and exasperation from foreign Governments than the United States' occasionally excessive bureaucratic zeal on trying to extend its laws and regulations extra-territorially.

Mr. Ball pointed out that the United States would resent it deeply if other nations tried to impose their peculiar policies and prejudices on the USA. He concluded that, if the United States continued to try to extend its jurisdiction beyond its borders, the whole system of international comity could break down.

There are many other statements by United States lawyers and citizens before Senate committees that I could quote, but I have already gone on for too long and time forbids it.

Perhaps, surprisingly, our proposals have received a remarkable good reception in the United States press. *The Washington Post* recently carried an editorial entitled "Anti-trust: The New Imperialism". It concluded:

> "the Sherman Anti-trust Act is not a suitable instrument for the regulation of world trade. Maintaining international competition is the proper business of diplomats and negotiation, not federal judges and litigation."

There have been several useful articles on the subject in the United States, where there is a general body of support for non-United States feeling about the effects doctrine.

The law does not operate in vacuum. It is not something only for debates on jurisprudence between academic lawyers. The law is there to defend the interests of citizens and it is essential that we look on the Bill as an

attempt to deal with a problem which we have failed to deal with at diplomatic level over many years. It is a genuine attempt to protect British economic interests, operating not necessarily even in the United States.

Mr. Ivan Lawrence (Burton): My right hon. Friend has made clear that an appalling situation exists. It is appalling that we should be driven by our close friends the Americans to have to take this sort of defensive action.

The situation has existed for a long time. Why has no action been taken in previous decades? Presumably a considerable number of British companies have suffered from the effects of United States legislation.

Mr. Nott: I cannot answer for my predecessors. I admit that our approach in clause 6 is rather novel and will, no doubt, cause a fair amount of fluttering in the legal dovecotes. I hope that when the Bill goes to another place senior and distinguished members of the legal profession will state their views.

I do not know why my predecessors have felt unable to take the action that I am proposing. I believe that the time has come to do so. There are two particularly prominent examples in the courts in the United States and it is appropriate to move forward in the way that I propose.

We already have powers under a 1964 Act to deal with certain aspects of the extra-territorial reach of United States laws, but that Act was passed in response to a specific and offensive instance of extra-territorial claim to jurisdiction by the United States in shipping matters. It proved useful in a number of cases in which we have been able to ensure that commercial documents in the United Kingdom have not been available in response to United States requirements, but we have found that, in the light of recent developments in the United States, the 1964 Act is no longer adequate to protect our interests.

I should tell the House that we have received representations from the United States Government about a number of aspects of the Bill, particularly the extension of the powers to prevent the production of documents from outside the United States, the total non-enforcement of multiple damage judgements, and the rights of recovery conferred by clause 6. We are examining with care the points which they have raised with us on the publication of the Bill.

I stress again that we are, as ever, ready and willing to try to resolve problems underlying our commercial relations with the United States, or for that matter any other country, by discussion and negotiation. We think this is the right way, particularly as both we and the United States share a common commitment to a generally liberal attitude to world trade. For example, although the anti-trust action against British shipping interests has had an influence on certain provisions of the Bill, I have made it clear when expressing my strong objections to the action of the United States authorities in that case that we stood willing to continue our discussions with them with the aim of reaching agreement between us on shipping matters. Discussions have taken place in Washington in the last fortnight and we hope that the United States will respond to this approach. But the House will understand that any future changes in United States practice cannot affect the cases of United Kingdom companies already before the courts, and there is no alternative but to go forward with this Bill at the same time.

The Bill, with its explanatory memorandum, is before the House and I felt that it was more important to explain to the House the background to the Government's decision to bring this measure forward, rather than to give a clause by clause exposition of the Bill. I can do so, but I think that we can leave that to Committee. The memorandum sets it out relatively clearly.

If the House does not insist that I go through the Bill clause by clause, I will make some general remarks on this Government's attitude to competition policy and its relationship to United States anti-trust policy. To some people it may seem odd for a Government committed to the strengthening of British competition policy to propose a measure to impede the enforcement by our courts of the competition policies of other countries. There is no incompatibility between the Competition Bill and this Bill. Competition law varies from State to State in accordance with their economic and other priorities, and there is no international consensus on what competition policy should be.

Lord Wilberforce said, when giving judgment in the House of Lords:

> "It is axiomatic that in anti-trust matters the policy of one State may be to defend what it is the policy of another State to attack".

That was a quite useful *obiter dictum* from Lord Wilberforce. Without needing here to go quite that far—and we are not going quite that far—I would say that competition law is a branch of public law on which, by contrast with most fields of private civil law, there can be no presumption that one State will enforce the policy and laws of another State—just as States generally decline to assist in the enforcement of the taxation law of other States. On competition judgments, the existing situation, under ancient principles of our law, is that our courts will not enforce criminal penalties in the laws of other States, whether on competition or on anything else. Clause 5 of this Bill will make clear that triple damage judgments will similarly not be enforced, and the discretionary power of subsection (4) and (5) would be available to specify other foreign competition policy judgments as non-enforceable, if the other powers proved insufficient to prevent the sort of mischiefs of which I have spoken. These are

points of important legal principle and do not affect the political commitment, which I believe we share with the United States, of operating and enforcing an effective competition policy in each of our two countries.

I say to the House that the Bill is not anti-American, or indeed anti-anybody. I hope that I have made that clear. It is designed to protect and not to provoke. But it deals with matters where the law and legal practice of the United States have become a matter of international concern—not only to us but to other nations, many of which have adopted their own means of looking after themselves. It is a legitimate exercise of our own sovereignty.

The Government believe that negotiation and discussion between sovereign Governments are always the best way to settle international trading problems and disputes, and therefore I hope that I shall have little cause to use the discretionary powers conferred by the Bill. But I wish to leave no doubt that I will be prepared to use it in the defence of the legitimate economic and trading interests of our country. I do not rule out further legal provisions unless we can solve these long-standing problems in a more satisfactory way than we have been able to do up to now.

I commend this Bill to the House.

THE PROTECTION OF TRADING INTERESTS ACT 1980 (1980 c. II)

An Act to provide protection from requirements, prohibitions and judgments imposed or given under the laws of countries outside the United Kingdom and affecting the trading or other interests of persons in the United Kingdom [20th March 1980].

1. Overseas measures affecting United Kingdom trading interests

(1) If it appears to the Secretary of State—

(a) that measures have been or are proposed to be taken by or under the law of any overseas country for regulation or controlling international trade; and

(b) that those measures, in so far as they apply or would apply to things done or to be done outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom, are damaging or threaten to damage the trading interests of the United Kingdom,

the Secretary of State may by order direct that this section shall apply to those measures either generally or in their application to such cases as may be specified in the order.

(2) The Secretary of State may by order make provision for requiring, or enabling the Secretary of State to require, a person in the United Kingdom who carries on business there to give notice to the Secretary of State of any requirement or prohibition imposed or threatened to be imposed on that person pursuant to any measures in so far as this section applies to them by virtue of an order under subsection (1) above.

(3) The Secretary of State may give to any person in the United Kingdom who carries on business there such directions for prohibiting compliance with any such requirement or prohibition as aforesaid as he considers appropriate for avoiding damage to the trading interests of the United Kingdom.

(4) The power of the Secretary of State to make orders under subsection (1) or (2) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(5) Directions under subsection (3) above may be either general or special and may prohibit compliance with any requirement or prohibition either absolutely or in such cases or subject to such conditions as to consent or otherwise as may be specified in the directions; and general directions under that subsection shall be published in such manner as appears to the Secretary of State to be appropriate.

(6) In this section "trade" includes any activity carried on in the course of a business of any description and "trading interests" shall be construed accordingly.

2. Documents and information required by overseas courts and authorities

(1) If it appears to the Secretary of State—

(a) that a requirement has been or may be imposed on a person or persons in the United Kingdom to produce to any court, tribunal or authority of an overseas country any commercial document which is not within the territorial jurisdiction of that country or to furnish any commercial information to any such court, tribunal or authority; or

(b) that any such authority has imposed or may impose a requirement on a person or persons in the United Kingdom to publish any such document or information,

the Secretary of State may, if it appears to him that the requirement is inadmissible by virtue of subsection (2) or (3) below, give directions for prohibiting compliance with the requirement.

(2) A requirement such as is mentioned in subsection (1)(*a*) or (*b*) above is inadmissible—

(a) if it infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom, or

(b) If compliance with the requirement would be prejudicial to the security of the United Kingdom or to the relations of the government of the United Kingdom with the government of any other country.

(3) A requirement such as is mentioned in subsection (1)(*a*) above is also inadmissible—

(a) if it is made otherwise than for the purposes of civil or criminal proceedings which have been instituted in the overseas country, or

(b) if it requires a person to state what documents relevant to any such proceedings are or have been in his possession, custody or power or to produce for the purposes of any such proceedings any documents other than particular documents specified in the requirement.

(4) Directions under subsection (1) above may be either general or special and may prohibit compliance with any requirement either absolutely or in such cases or subject to such conditions as to consent or otherwise as may be specified in the directions; and general directions under that subsection shall be published in such

manner as appears to the Secretary of State to be appropriate.

(5) For the purposes of this section the making of a request or demand shall be treated as the imposition of a requirement if it is made in circumstances in which a requirement to the same effect could be or could have been imposed; and

(a) any request or demand for the supply of a document or information which, pursuant to the requirement of any court, tribunal or authority of an overseas country, is addressed to a person in the United Kingdom; or

(b) any requirement imposed by such a court, tribunal or authority to produce or furnish any document or information to a person specified in the requirement,

shall be treated as a requirement to produce or furnish that document or information to that court, tribunal or authority.

(6) In this section "commercial document" and "commercial information" mean respectively a document or information relating to a business of any description and "document" includes any record or device by means of which material is recorded or stored.

3. Offenses under §§ 1 and 2

(1) Subject to subsection (2) below, any person who without reasonable excuse fails to comply with any requirement imposed under subsection (2) of section 1 above or knowingly contravenes any directions given under subsection (3) of that section or section 2(1) above shall be guilty of an offence and liable—

(a) on conviction on indictment, to a fine;

(b) on summary conviction, to a fine not exceeding the statutory maximum.

(2) A person who is neither a citizen of the United Kingdom and Colonies nor a body corporate incorporated in the United Kingdom shall not be guilty of an offence under subsection (1) above by reason of anything done or omitted outside the United Kingdom in contravention of directions under section 1(3) or 2(1) above.

(3) No proceedings for an offence under subsection (1) above shall be instituted in England, Wales or Northern Ireland except by the Secretary of State or with the consent of the Attorney General or, as the case may be, the Attorney General for Northern Ireland.

(4) Proceedings against any person for an offence under this section may be taken before the appropriate court in the United Kingdom having jurisdiction in the place where that person is for the time being.

(5) In subsection (1) above "the statutory maximum" means—

(a) in England and Wales and Northern Ireland, the prescribed sum within the meaning of [section 32 of the Magistrates' Courts Act 1980] (at the passing of this Act £1,000);

(b) *(applies to Scotland)*;

and for the purposes of the application of this subsection in Northern Ireland the provisions of [the said Act of 1980] relating to the sum mentioned in paragraph *(a)* shall extend to Northern Ireland.

4. Restriction of Evidence (Proceedings in Other Jurisdictions) Act 1975

A court in the United Kingdom shall not make an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 for giving effect to a request

issued by or on behalf of a court or tribunal of an overseas country if it is shown that the request infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; and a certificate signed by or on behalf of the Secretary of State to the effect that it infringes that jurisdiction or is so prejudicial shall be conclusive evidence of that fact.

5. Restriction on enforcement of certain overseas judgments

(1) A judgment to which this section applies shall not be registered under Part II of the Administration of Justice Act 1920 or Part 1 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 and no court in the United Kingdom shall entertain proceedings at common law for the recovery of any sum payable under such a judgment.

(2) This section applies to any judgment given by a court of an overseas country, being—

(a) a judgment for multiple damages within the meaning of subsection (3) below;

(b) a judgment based on a provision or rule of law specified or described in an order under subsection (4) below and given after the coming into force of the order; or

(c) a judgment on a claim for contribution in respect of damages awarded by a judgment falling within paragraph *(a)* or *(b)* above.

(3) In subsection (2) *(a)* above a judgment for multiple damages means a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favor the judgment is given.

(4) The Secretary of State may for the purposes of subsection (2) *(b)* above make an order in respect of any provision or rule of law which appears to him to be concerned with the prohibition or regulation of agreements, arrangements or practices designed to restrain, distort or restrict competition in the carrying on of business of any description or to be otherwise concerned with the promotion of such competition as aforesaid.

(5) The power of the Secretary of State to make orders under subsection (4) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(6) Subsection (2) *(a)* above applies to a judgment given before the date of the passing of this Act as well as to a judgment given on or after that date but this section does not affect any judgment which has been registered before that date under the provisions mentioned in subsection (1) above or in respect of which such proceedings as are there mentioned have been finally determined before that date.

6. Recovery of awards of multiple damages

(1) This section applies where a court of an overseas country has given a judgment for multiple damages within the meaning of section 5(3) above against

(a) a citizen of the United Kingdom and Colonies; or

(b) a body corporate incorporated in the United Kingdom or in a territory outside the United Kingdom for whose international relations Her Majesty's Government in the United Kingdom are responsible; or

(c) a person carrying on business in the United Kingdom,

(in this section referred to as "qualifying defendant") and an amount on account of the damages has been paid by the qualifying defendant either to the party in whose

favour the judgment was given or to another party who is entitled as against the qualifying defendant to contribution in respect of the damages.

(2) Subject to subsections (3) and (4) below, the qualifying defendant shall be entitled to recover from the party in whose favour the judgment was given so much of the amount referred to in subsection (1) above as exceeds the part attributable to compensation; and that part shall be taken to be such part of the amount as bears to the whole of it the same proportion as the sum assessed by the court that gave the judgment as compensation for the loss or damage sustained by that party bears to the whole of the damages awarded to that party.

(3) Subsection (2) above does not apply where the qualifying defendant is an individual who was ordinarily resident in the overseas country at the time when the proceedings in which the judgment was given were instituted or a body corporate which had its principal place of business there at that time.

(4) Subsection (2) above does not apply where the qualifying defendant carried on business in the overseas country and the proceedings in which the judgment was given were concerned with activities exclusively carried on in that country.

(5) A court in the United Kingdom may entertain proceedings on a claim under this section notwithstanding that the person against whom the proceedings are brought is not within the jurisdiction of the court.

(6) The reference in subsection (1) above to an amount paid by the qualifying defendant includes a reference to an amount obtained by execution against his property or against the property of a company which (directly or indirectly) is wholly owned by him; and references in that subsection and subsection (2) above to the party in whose favour the judgment was given or

to a party entitled to contribution include references to any person in whom the rights of any such party have become vested by succession or assignment or otherwise.

(7) This section shall, with the necessary modifications, apply also in relation to any order which is made by a tribunal or authority of an overseas country and would, if that tribunal or authority were a court, be a judgment for multiple damages within the meaning of section 5(3) above.

(8) This section does not apply to any judgment given or order made before the passing of this Act.

7. Enforcement of overseas judgment under provision corresponding to § 6

(1) If it appears to Her Majesty that the law of an overseas country provides or will provide for the enforcement in that country of judgments given under section 6 above, Her Majesty may by Order in Council provide for the enforcement in the United Kingdom of judgments given under any provision of the law of that country corresponding to that section.

(2) An Order under this section may apply, with or without modification, any of the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933.

8. Short title, interpretation, repeals and extent

(1) This Act may be cited as the Protection of Trading Interests Act 1980.

(2) In this Act "overseas country" means any country or territory outside the United Kingdom other than one for whose international relations Her Majesty's Government in the United Kingdom are responsible.

(3) References in this Act to the law or a court, tribunal or authority of an overseas country include, in the case of a federal state, reference to the law or a court,

tribunal or authority of any constituent part of that country.

(4) References in this Act to a claim for, or to entitlement to, contribution are references to a claim or entitlement based on an enactment or rule of law.

(5) The Shipping Contracts and Commercial Documents Act 1964 (which is superseded by this Act) is hereby repealed, *together with paragraph 18 of Schedule 2 and paragraph 24 of Schedule 3 to the Criminal Law Act 1977 (which contain amendments of that Act).*

(6) Subsection (5) above shall not affect the operation of the said Act of 1964 in relation to any directions given under that Act before the passing of this Act.

(7) This Act extends to Northern Ireland.

(8) Her Majesty may by Order in Council direct that this Act shall extend with such exceptions, adaptations and modifications, if any, as may be specified in the Order to any territory outside the United Kingdom, being a territory for the international relations of which Her Majesty's Government in the United Kingdom are responsible.

Competition Act 1980 *

(1980 c. 21)

An Act to abolish the Price Commission; to make provision for the control of anti-competitive practices in the supply and acquisition of goods and the supply and securing of services; to provide for references of certain public bodies and other persons to the Monopolies and Mergers Commission; to provide for the investigation of prices and charges by the Director General of Fair Trading; to provide for the making of grants to certain bodies; to amend and provide for the amendment of the Fair Trading Act 1973; to make amendments with respect to the Restrictive Trade Practices Act 1976; to repeal the remaining provisions of the Counter-Inflation Act 1973; and for purposes connected therewith. [3rd April 1980]

* * * *

Anti-competitive practices

2.—(1) The provisions of sections 3 to 10 below have effect with a view to the control of anti-competitive practices, and for the purposes of this Act a person engages in an anti-competitive practice if, in the course of business, that person pursues a course of conduct which, of itself or when taken together with a course of conduct pursued by persons associated with him, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in the United Kingdom or any part of it or the supply or securing of services in the United Kingdom or any part of it.

(2) To the extent that a course of conduct is required or envisaged by a material provision of, or a material recommendation in, an agreement which is registered or subject to registration under the Restrictive Trade Practices Act 1976, that course of conduct shall not be regarded

as constituting an anti-competitive practice for the purposes of this Act; and for the purposes of this subsection—

(a) a provision of an agreement is a material provision if, by virtue of the existence of the provision (taken alone or together with other provisions) the agreement is one to which that Act applies; and

(b) a recommendation is a material recommendation in an agreement if it is one to which a term implied into the agreement by any provision of section 8 or section 16 of that Act (terms implied into trade association agreements and services supply association agreements) applies.

(3) For the purposes of this Act, a course of conduct does not constitute an anti-competitive practice if it is excluded for those purposes by an order made by the Secretary of State; and any such order may limit the exclusion conferred by it by reference to a particular class of persons or to particular circumstances.

(4) Without prejudice to the generality of subsection (3) above, an order under that subsection may exclude the conduct of any person by reference to the size of his business, whether expressed by reference to turnover, as defined in the order, or to his share of a market, as so defined, or in any other manner.

(5) For the purpose only of enabling the Director General of Fair Trading (in this Act referred to as "the Director") to establish whether any person's course of conduct is excluded by virtue of any such provision of an order under subsection (3) above as is referred to in subsection (4) above, the order may provide for the application, with appropriate modifications, of any provisions of sections 44 and 46 of the Fair Trading Act 1973 (power of Director to require information).

(6) For the purpose of this section any two persons are to be treated as associated—

(a) if one is a body corporate of which the other directly or indirectly has control either alone or with other members of a group of interconnected bodies corporate of which he is a member, or

(b) if both are bodies corporate of which one and the same person or group of persons directly or indirectly has control;

and for the purposes of this subsection a person or group of persons able directly or indirectly to control or materially to influence the policy of a body corporate, but without having a controlling interest in that body corporate, may be treated as having control of it.

(7) In this section "the supply or securing of services" includes providing a place or securing that a place is provided other than on a highway, or in Scotland a public right of way, for the parking of a motor vehicle (within the meaning of the Road Traffic Act 1972).

(8) For the purposes of this Act any question whether, by pursuing any course of conduct in connection with the acquisition of goods or the securing of services by it, a local authority is engaging in an anti-competitive practice shall be determined as if the words "in the course of business" were omitted from subsection (1) above; and in this subsection "local authority" means—

(a) in England and Wales, a local authority within the meaning of the Local Government Act 1972, the Common Council of the City of London or the Council of the Isles of Scilly,

(b) in Scotland, a local authority within the meaning of the Local Government (Scotland) Act 1973, and

(c) in Northern Ireland, a district council established under the Local Government Act (Northern Ireland) 1972.

[¶ 2005] **Article 85**

[Prohibited Practices]

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(*a*) directly or indirectly fix purchase or selling prices or any other trading conditions;

(*b*) limit or control production, markets, technical development, or investment;

(*c*) share markets or sources of supply;

(*d*) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(*e*) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

European Communities Act 1972 *

(1972 c. 68)

An Act to make provision in connection with the enlargement of the European Communities to include the United Kingdom, together with (for certain purposes) the Channel Islands, the Isle of Man and Gibraltar. [17 October 1972]

* * * *

General implementation of Treaties

2.—(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.

(2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision—

(a) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

(b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;

and in the exercise of any statutory power or duty, including any power to give directions or to legislate by

means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the Communities and to any such obligation or rights as aforesaid.

In this subsection "designated Minister or department" means such Minister of the Crown or government department as may from time to time be designated by Order in Council in relation to any matter or for any purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council.

(3) There shall be charged on and issued out of the Consolidated Fund or, if so determined by the Treasury, the National Loans Fund the amounts required to meet any Community obligation to make payments to any of the Communities or member States, or any Community obligation in respect of contributions to the capital or reserves of the European Investment Bank or in respect of loans to the Bank, or to redeem any notes or obligations issued or created in respect of any such Community obligation; and, except as otherwise provided by or under any enactment,—

(a) any other expenses incurred under or by virtue of the Treaties or this Act by any Minister of the Crown or government department may be paid out of moneys provided by Parliament; and

(b) any sums received under or by virtue of the Treaties or this Act by any Minister of the Crown or government department, save for such sums as may be required for disbursements permitted by any other enactment, shall be paid into the Consolidated Fund or, if so determined by the Treasury, the National Loans Fund.

(4) The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed

or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section; but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council and regulations.

(5) The limitations on the legislative power of the Parliament of Northern Ireland which are imposed by section 4(1)(4) (treaty matters) of the Government of Ireland Act 1920 shall not be construed to prevent that Parliament, on matters otherwise within their powers, from enacting provisions for any of the purposes mentioned in subsection (2) *(a)* and *(b)* above; and the references in that subsection to a Minister of the Crown or government department and to a statutory power or duty shall include a Minister or department of the Government of Northern Ireland and a power or duty arising under or by virtue of an Act of the Parliament of Northern Ireland.

(6) A law passed by the legislature of any of the Channel Islands or of the Isle of Man, or a colonial law (within the meaning of the Colonial Laws Validity Act 1865) passed or made for Gibraltar, if expressed to be passed or made in the implementation of the Treaties and of the obligations of the United Kingdom thereunder, shall not be void or inoperative by reason of any inconsistency with or repugnancy to an Act of Parliament, passed or to be passed, that extends to the Island or Gibraltar or any provision having the force and effect of an Act there (but not including this section), nor by reason of its having some operation outside the Island or Gibraltar; and any such Act or provision that extends to the Island or Gibraltar shall be construed and have effect subject to the provisions of any such law.

Fair Trading Act 1973 *

(1973 c. 41)

* * * *

Monopoly situation in relation to supply of goods

6.—(1) For the purposes of this Act a monopoly situation shall be taken to exist in relation to the supply of goods of any description in the following cases, that is to say, if—

(a) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by one and the same person, or are supplied to one and the same person, or

(b) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by members of one and the same group of interconnected bodies corporate, or are supplied to members of one and the same group of interconnected bodies corporate, or

(c) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by members of one and the same group consisting of two or more such persons as are mentioned in subsection (2) of this section, or are supplied to members of one and the same group consisting of two or more such persons, or

(d) one or more agreements are in operation, the result or collective result of which is that goods of that description are not supplied in the United Kingdom at all.

(2) The two or more persons referred to in subsection (1)(c) of this section, in relation to goods of any description, are any two or more persons (not being a group of interconnected bodies corporate) who whether voluntarily or not, and whether by agreement or not, so conduct their respective affairs as in any way to prevent, restrict or distort competition in connection with the production or supply of goods of that description, whether or not they themselves are affected by the competition and whether the competition is between persons interested as producers or suppliers or between persons interested as customers of producers or suppliers.

Monopoly situation in relation to supply of services

7.—(1) For the purposes of this Act a monopoly situation shall be taken to exist in relation to the supply of services of any description in the following cases, that is to say, if—

(a) the supply of services of that description in the United Kingdom is, to the extent of at least one-quarter, supply by one and the same person, or supply for one and the same person, or

(b) the supply of services of that description in the United Kingdom is, to the extent of at least one-quarter, supply by members of one and the same group of interconnected bodies corporate, or supply for members of one and the same group of interconnected bodies corporate, or

(c) the supply of services of that description in the United Kingdom is, to the extent of at least one-quarter, supply by members of one and the same group consisting of two or more such persons as are mentioned in subsection (2) of this section, or supply for members of one and the same group consisting of two or more such persons, or

(d) one or more agreements are in operation, the result or collective result of which is that services of that description are not supplied in the United Kingdom at all.

(2) The two or more persons referred to in subsection (1)(c) of this section, in relation to services of any de-

scription, are any two or more persons (not being a group of interconnected bodies corporate) who whether voluntarily or not, and whether by agreement or not, so conduct their respective affairs as in any way to prevent, restrict or distort competition in connection with the supply of services of that description, whether or not they themselves are affected by the competition, and whether the competition is between persons interested as persons by whom, or as persons for whom, services are supplied.

(3) In the application of this section for the purposes of a monopoly reference, the Commission, or the person or persons making the reference, may, to such extent as the Commission, or that person or those persons, think appropriate in the circumstances, treat services as supplied in the United Kingdom if the person supplying the services—

(a) has a place of business in the United Kingdom, or

(b) controls the relevant activities from the United Kingdom, or

(c) being a body corporate, is incorporated under the law of Great Britain or of Northern Ireland,

and may do so whether or not those services would otherwise be regarded as supplied in the United Kingdom.

* * * *

Order of appropriate Minister on report on monopoly reference

56.—(1) The provisions of this section shall have effect where a report of the Commission on a monopoly reference not limited to the facts has been laid before Parliament in accordance with the provisions of Part VII of this Act, and the conclusions of the Commission set out in the report, as so laid,—

(a) include conclusions to the effect that a monopoly situation exists and that facts found by the Commission in pursuance of their investigations under section 49 of this Act operate, or may be expected to operate, against the public interest, and

(b) specify particular effects, adverse to the public interest, which in their opinion those facts have or may be expected to have.

(2) In the circumstances mentioned in the preceding subsection the appropriate Minister may (subject to subsection (6) of this section) by order made by statutory instrument exercise such one or more of the powers specified in Parts I and II of Schedule 8 to this Act as he considers it requisite to exercise for the purpose of remedying or preventing the adverse effects specified in the report as mentioned in the preceding subsection; and those powers may be so exercised to such extent and in such manner as the appropriate Minister considers requisite for that purpose.

(3) In determining whether, or to what extent or in what manner, to exercise any of those powers, the appropriate Minister shall take into account any recommendations included in the report of the Commission in pursuance of section 54 (3) (b) of this Act and any advice given by the Director under section 88 of this Act.

(4) Subject to the next following subsection, in this section "the appropriate Minister" means the Secretary of State.

(5) Where, in any such report as is mentioned in subsection (1) of this section, the person or one of the persons specified as being the person or persons in whose favour the monopoly situation in question exists is a body corporate fulfilling the following conditions, that is to say—

(a) that the affairs of the body corporate are managed by its members, and

(b) that by virtue of an enactment those members are appointed by a Minister,

then for the purpose of making any order under this section in relation to that body corporate (but not for the

purpose of making any such order in relation to any other person) "the appropriate Minister" in this section means the Minister by whom members of that body corporate are appointed.

(6) In relation to any such body corporate as is mentioned in subsection (5) of this section, the powers exercisable by virtue of subsection (2) of this section shall not include the powers specified in Part II of Schedule 8 to this Act.

REPORT TO CONGRESS ON THE TAXATION OF INCOME EARNED BY MEMBERS OF INSURANCE OR REINSURANCE SYNDICATES

[SEAL]

Department of the Treasury

February 1989

—Underwriters at Lloyd's of London are to be taxed as individuals.

—Individual underwriters (both U.S. and foreign) are deemed to have a "permanent establishment" in the U.S., which means that the income attributable thereto (both underwriting income and investment income) is subject to income tax on a net basis. There is only one level of U.S. tax imposed.

—All U.S. source investment income earned from premiums placed in U.S.-based trust accounts is taxed annually to each underwriter; underwriting profit and losses are taxed using the so-called 3-year accounting method applied to Lloyd's of London underwriters under British law.

—Under source rules agreed to in the closing agreement, some premiums paid in U.S. dollars (as the currency of convenience between the parties) are deemed to be for U.S. insurance (and subject to net-basis taxation under the agreement) even though the risk is not located in the U.S. and the insurance income would not otherwise be subject to U.S. tax. Conversely, a small amount of business written in currencies other than the U.S. dollar is exempted from tax, even though it involves U.S. situs risks.

—U.S. dollar premiums paid for U.S. reinsurance placed without the use of a U.S. broker are deemed not to be earned through a U.S. permanent establishment and are subject instead to the gross-basis insurance premium excise tax imposed under section 4371 of the Internal Revenue Code of 1986. (The U.S./U.K. income tax treaty relieves British residents from the excise tax, however.) All such reinsurance premiums are placed in a U.S. trust fund, and investment income earned by the premiums is subject to U.S. taxation under a formula set forth in the closing agreement. In addition, excise tax is

collected on certain reinsurance policies obtained by underwriters at Lloyd's of London for reinsurance of U.S. risks.

* * * *

After 1850, the Lloyd's of London business expanded beyond marine insurance. By 1900, Lloyd's of London had evolved into a sophisticated insurance market, and the early years of this century were marked by rapidly increasing regulation and improved procedures. In 1902, Lloyd's of London began requiring deposits or guarantees from members. In 1903, the Committee of Lloyd's began requiring each new underwriter to put a portion of his premium income and investment yield in irrevocable 3-year trusts for the payment of underwriting liabilities and to assure the protection of policyholders. About 1908, Lloyd's of London began requiring audits of all syndicate accounts by an approved independent auditor. In 1909, the British Parliament enacted the Assurance Companies Act, which required deposits of money to be set aside by insurance companies and by every individual underwriter in relation to the amount of the risks underwritten. The Lloyd's Committee obtained an exemption from the deposit requirement for any underwriter who could produce a certificate of solvency and had provided the Committee with a deposit or guarantee equal to a year's premium income. This is the origin of the "means" test for qualification as a Lloyd's underwriter and of the deposit requirement that new members must satisfy; the "means" test and deposit requirement are more fully explained below.

Underwriters at Lloyd's of London began insuring U.S. risks at least by 1892. In 1939, the Committee of Lloyd's established the Lloyd's American Trust Funds ("LATF"), maintained by Citibank as trustee, into which all dollar premiums must be paid. The assets of the trust fund currently exceed $3 billion.

Originally, Lloyd's of London syndicates tended to be small; in 1856, most of the syndicates had no more than

three members with the largest having approximately six members. In 1952, sixteen syndicates had 100 members or more, and one syndicate had 300 members. Syndicates have continued to grow in number and size; for 1988 there were 376 syndicates, some of which included more than 1,000 members. Approximately 10 percent of the more than 33,500 Lloyd's of London underwriters in 1988 were U.S. residents or citizens.

B. Lloyd's of London Today

The Corporation of Lloyd's provides facilities and services to assist underwriters in carrying on their business. This Corporation does not underwrite any insurance. It acts within limits established by a Council composed of twelve active underwriting members of Lloyd's of London, eight nonworking members of Lloyd's and eight nonmembers of Lloyd's of London approved by the Governor of the Bank of England. The 1982 Lloyd's Act empowered the Council to control the admission and discipline of members; to set the members' reserve requirements beyond the amounts in the premiums trust funds [1] (*i.e.*, the Deposit Guaranty Funds, and the Central Fund); to set the fees and deposits required; to control and provide central accounting, claims adjustment, collections, and special services; to set restrictions on and standards for brokers, managing agents, and underwriters; to check for conformity and process all policies; and to have the power of general assessment on its members. The 1982 Act does not authorize the Council to direct the day-to-day insurance business transacted at Lloyd's of London.

Each member of Lloyd's of London must select a member's agent who assists the underwriter in selecting one or more managing syndicates. Through agency agree-

[1] These reserves are not reserves for tax purposes, but amounts required by Lloyd's of London to be set aside as security to ensure the payment of claims.

ments, the member grants authority for underwriting activities to be conducted on his behalf. Members cannot conduct their insurance business directly. It is typical for a member to join a number of syndicates, which can vary from year to year, in order to spread his risks.

To obtain insurance at Lloyd's of London, a potential insured or his broker must contact a broker in London who is authorized by Lloyd's of London to place business at Lloyd's of London, or contact a broker outside London to whom, through an authorized London broker, certain Lloyd's of London underwriters have given written binding authority.

To be eligible to underwrite insurance at Lloyd's of London, an individual must apply and be sponsored by an existing member. The applicant must meet a "means" or net worth test to ensure that he will have sufficient assets to satisfy possible claims and to provide a basis for setting the member's premium limit.

Nos. 91-1111 & 91-1128

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1992

HARTFORD FIRE INSURANCE CO., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL., RESPONDENTS

MERRETT UNDERWRITING AGENCY, ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL., RESPONDENTS

ORDER ENTERED OCTOBER 5, 1992
GRANTING PETITIONS FOR CERTIORARI

The motion of Brokers & Reinsurance Markets Association for leave to file a brief as *amicus curiae* in No. 91-1111 is granted. The petition for a writ of certiorari in No. 91-1111 is granted limited to Questions 1 and 2 presented by the petition. The petition for a writ of certiorari in No. 91-1128 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.

(2) 9

Nos. 91-1111 & 91-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., et al.,
Petitioners,

—v.—

STATE OF CALIFORNIA, et al.,
Respondents.

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, et al.,
Petitioners,

—v.—

STATE OF CALIFORNIA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS IN No. 91-1128

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QUESTION PRESENTED

Did the court of appeals properly assess the extraterritorial reach of the U.S. antitrust laws, in light of this Court's teachings and contemporary understanding of international law, when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

This case involves complaints by nineteen states and numerous private plaintiffs that were consolidated for pretrial purposes by the Judicial Panel on Multi-District Litigation in MDL Docket No. 767.

Plaintiffs in the consolidated proceeding, who were also appellants in the Court of Appeals for the Ninth Circuit, were:

States: The States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, Ohio, Pennsylvania, Washington, West Virginia, and Wisconsin.

State or Local Government Entities, Listed by State:

Alabama: City of Mobile; City of Birmingham

California: City of Lafayette; City and County of San Francisco; County of San Benito

Louisiana: City of Baton Rouge; City of New Orleans; City of Slidell; City of Nachitoches; City of Eunice

Massachusetts: Town of Hanover; Town of Milford

Montana: County of Teton

New York: Roosevelt Island Operating Authority, Inc.; Village of Croton; Village of Lake Success

Ohio: Township of Jackson; County of Hardin

Pennsylvania: County of Schuylkill; City of Altoona; City of York; Borough of Chambersburg

Washington: County of Cowlitz

West Virginia: City of Clay; County of Hancock; County of Mineral; County of Wirt

Private Plaintiffs: Big D Building Supply Corp.; Anastasios Markos, T/A Municipal Exxon; Bay Harbor Park Homeowners

Ass'n, Inc.; Environmental Aviation Sciences, Inc.; Carlisle Day Care Center, Inc.; Bensalem Township Authority; Keyboard Communications, Inc.; Glabman Paramount Furniture Mfg. Co., Inc.; Les-Ray Bobcat, Inc.; Jerry Grant Chemical Associates, Inc.; Durawood, Inc.; Carmella M. "Boots" Liberto Trading as R.J. Liberto, Inc.; Henry L. Rosenfeld; Acme Corrugated Box Co., Inc.; P&J Casting Corp.; Ace Check Cashing, Inc.

Defendants in the consolidated proceeding, who were also appellees in the Ninth Circuit, were, beside petitioners, the following:

Allstate Insurance Company; Aetna Casualty & Surety Company; CIGNA Corporation; General Reinsurance Corporation; Hartford Fire Insurance Company; Insurance Company of North America; Insurance Services Office, Inc.; Reinsurance Association of America; Thomas A. Greene & Company, Inc.; Ballantyne, McKean & Sullivan Limited; C.J.W. (Underwriting Agencies) Limited (sued herein as C.J. Warrilow-Hine & Butcher, Ltd.); Lambert Brothers (Underwriting Agencies) Limited (sued herein as J. Brian Hose & Others, Ltd.); R.K. Carvill & Co., Ltd; Continental Reinsurance Corporation (U.K.) Limited; Unionamerica Insurance Company, Ltd.; CNA Re (U.K.), Ltd.; Kemper Reinsurance London, Ltd.; Constitution Reinsurance Corporation; Mercantile & General Reinsurance Company of America; Prudential Reinsurance Company; North American Reinsurance Company; Winterthur Swiss Insurance Company; Excess Insurance Company, Ltd.; Excess Insurance Group, Ltd.; Terra Nova Insurance Company Limited.

Parent companies and subsidiaries (except wholly owned subsidiaries) of petitioners in No. 91-1128 are listed in the Petition for Writ of Certiorari in No. 91-1128, filed January 13, 1992, at iv (the "Petition"), and of the respondents joining in this Brief in their Response in Support of Petition for Writ of Certiorari pursuant to Rule 12.4 at i.

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IN THE

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Petitioners,

—v.—

STATE OF CALIFORNIA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS IN No. 91-1128

Petitioners Merrett Underwriting Agency Management Limited, Three Quays Underwriting Management Limited, Janson Green Management Limited, Murray Lawrence & Partners, D.P. Mann Underwriting Agency Limited, Robin A.G. Jackson, Peter N. Miller and Edwards & Payne (Underwriting Agencies) Limited respectfully submit their brief on the merits.

OPINIONS BELOW

The opinion of the court of appeals is reported at 938 F.2d 919 (9th Cir. 1991). A-1-31.[1] The opinion of the district court is reported at 723 F. Supp. 464 (N.D. Cal. 1989). A-32-83.

JURISDICTION

The opinion of the court of appeals was entered on June 18, 1991. Petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc*, which the court of appeals denied on October 15, 1991. The Petition for Writ of Certiorari was filed on January 13, 1992, and this Court granted Certiorari on October 5, 1992. JA-308.[2] Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Sections 1 and 7 of the Sherman Act, 15 U.S.C. §§ 1 and 6a, respectively. Section 1 of the Sherman Act was enacted July 2, 1890. Section 7 of the Sherman Act was enacted October 8, 1982, as part of the Foreign Trade Antitrust Improvements Act. The full texts of these provisions are reproduced in the Appendix to the Petition at A-93.

1 Numbers following the letter "A" denote reference to the Appendix to the Petition.

2 Citations in the form "JA" denote reference to the Joint Appendix.

STATEMENT

A. The Claims At Issue

Nineteen states and numerous private plaintiffs brought these antitrust actions in 1988 following a two-year long investigation in the United States and abroad. The plaintiffs represent persons who purchased or allegedly sought to purchase commercial liability insurance in the United States. State of California Complaint ("Cal. Compl.") ¶ 5.[3] This brief addresses only three claims ("the London reinsurance claims") in these actions, which allege that conduct engaged in by British subjects at the insurance and reinsurance marketplace known as Lloyd's of London, or by British insurance companies underwriting in London reinsurance markets, violated the U.S. antitrust laws. The plaintiffs in these three claims do not purport to purchase reinsurance in the London market. All the defendants in these claims are British subjects. Petitioners in No. 91-1128 are individuals and entities operating in the market known as Lloyd's of London. The other defendants in these claims are British corporations known as London Company reinsurers, and one broker.[4] *Id.* Each is involved in the business of reinsurance or retrocessional reinsurance in London. *Id.*

Reinsurance is insurance for insurers. Retrocessional reinsurance is reinsurance for reinsurers. London is one of the principal places around the world to which insurers turn to obtain reinsurance or retrocessional reinsurance of large and unique risks, which require the subscription of numerous underwriters to spread these risks. Other world markets for reinsurance include Munich, Zurich and Tokyo.

3 For convenience of reference, this brief cites only to the complaint filed by the State of California unless particular reference is made to another complaint. The complaints of the other plaintiff states and of most of the private plaintiffs, to the extent those latter complaints contain any detailed allegations, contain provisions parallel to those contained in the State of California complaint. The Cal. Compl. is found at JA-5-56.

4 These other defendants join in this brief to urge reversal of the decision below and dismissal of the London reinsurance claims.

Each of the London reinsurance claims attacks alleged agreements among London reinsurers over the coverage risks they were willing to accept. Through these claims, plaintiffs seek to modify the behavior of participants in the London reinsurance market, on the faulty hypothesis that the terms of reinsurance issued in London determine the terms of insurance issued in the U.S. This indirect effect provides the basis for assertion of jurisdiction over the London reinsurance claims.

The first of these three claims alleges that certain defendant London reinsurers agreed that they would only write reinsurance for liability risks on a claims made form.[5] Cal. Compl. ¶¶ 86-92; 131-135. Another alleges that the defendant London reinsurers, and one London reinsurance broker, agreed that their North American casualty (*i.e.*, liability) reinsurance treaties would contain a pollution exclusion term. *Id.* ¶¶ 93-96; 136-140. The final claim alleges a market agreement in the "LMX market," where retrocessional reinsurance coverage is provided solely to London-based underwriters. *Id.* ¶ 107. In this claim, plaintiffs assert that certain LMX reinsurers in London agreed in 1987 to include in their LMX retrocessional coverages an exclusion for North American property risks where the original property insurance coverage did not contain a seepage, pollution and contamination exclusion clause. *Id.* ¶¶ 106-110; 146-150.

The London-based conduct challenged in these three claims has long been subject to an intricate framework of regulation and competition law established by the British Government. Plaintiffs' complaints seek both compensatory and injunctive relief, but it is the injunctive relief that is central to these actions. Plaintiffs ask the U.S. court to silence the London reinsurance defendants, including petitioners, from making any public announcements about product restrictions, pricing behavior or loss reserve changes. Cal. Compl. ¶ 167. They ask

5 In general, a claims made form provides coverage only for claims made in the period in which the policy is in effect, while an occurrence form provides coverage for damage and injuries occurring during the policy period, regardless of when a claim is made.

the U.S. court to order the London reinsurers to withdraw any terms or conditions of coverage the London reinsurers have established in London in the exercise of their business judgment. *Id.* ¶ 174. They demand that the U.S. court order the London reinsurance broker defendants not to provide information to any reinsurer on prices, terms or conditions, except as the court may consider necessary for the negotiation of particular reinsurance contracts. *Id.* ¶ 176. They ask that the London reinsurers be ordered to divest themselves of any reinsurance affiliates. *Id.* ¶ 177. And they ask the U.S. court to monitor the compliance of the London reinsurers with the U.S. antitrust laws for the next ten years. *Id.* ¶ 181. Collectively, these proposed injunctive terms seek to restructure the fundamentals of the London reinsurance marketplace in which petitioners do business.

B. The Rulings Below

The British defendants named in the three London reinsurance claims moved before the district court to dismiss those claims for lack of subject matter jurisdiction and under principles of international comity. Noting that a two-year investigation had preceded the institution of the actions, the district court found none of the pertinent facts in dispute. A-69-71. The district court held that it possessed subject matter jurisdiction over the London reinsurance claims under the antitrust laws, because the complaints sufficiently alleged the requisite effect on American commerce. *Id.*

The district court declined to exercise that jurisdiction, however, under principles of international law and comity articulated by the Court of Appeals for the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America.*[6] The district court concluded that "enforcement of the [U.S.] antitrust laws against activities in the London reinsurance market would lead to significant conflict with English law and policy." A-75. Having

6 549 F.2d 597 (9th Cir. 1976) (*"Timberlane I"*), *appeal after remand*, 749 F.2d 1378 (9th Cir. 1984) (*"Timberlane II"*), *cert. denied*, 472 U.S. 1032 (1985).

carefully assessed each of the factors set forth in *Timberlane* as pertinent to considerations of comity, the district court further concluded that "[t]he conflict with English law and policy which would result from the extra-territorial application of the antitrust laws in this case is not outweighed by other factors." Recognizing that the conduct alleged had at best attenuated effects in the United States, the district court added:

> Although the conduct complained of had effects within the United States, it is not alleged to have excluded competitors from markets or denied consumers access to markets, and it is not alleged to have occurred for that purpose.

A-78.

On appeal, the court of appeals agreed that the exercise of jurisdiction would result in "conflict with a long-established British policy towards a venerable British trade, the underwriting of insurance." A-31. The court of appeals nonetheless reversed, holding that the "significant conflict with English law and policy" was outweighed by plaintiffs' allegation that the British defendants' actions in England had direct, substantial and reasonably foreseeable effects in the United States. A-29-31. The court of appeals treated these effects as virtually dispositive: "[i]f a complaint survives the new bar of 15 U.S.C. § 6a (the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA")) because the conduct has a 'direct, substantial, and reasonabl[y] foreseeable effect' on American commerce, it is only in an unusual case that comity will require abstention from the exercise of jurisdiction." A-28. The court of appeals did not discuss at all one of the central factors in any analysis of a problem in conflict of laws or extraterritorial jurisdiction: the locus of the relevant conduct.[7]

7 The court of appeals also found it significant that some of the British defendants in these claims are subsidiaries of American corporations (A-29), even though those parents are not named in the complaints and there are no allegations that any parent company played any role in the events complained of. Petitioners here have no American parents, subsidiaries or affiliates. The unpleaded assertion of the parentage of the other defendants in these claims, which is not even correct as to all of the London Company defendants, is irrelevant. They are British citizens operating in the same London reinsurance markets as petitioners.

SUMMARY OF ARGUMENT

With this petition, the Court has assumed the task of assessing the extent to which the United States should exercise jurisdiction to apply its economic regulatory laws to activity centered abroad. The precedents of this Court demonstrate that an "effects" or minimum contacts analysis provides an incomplete jurisdictional basis where the international community has an interest. The circuit court precedents, and two generations of Restatements, teach not only that principles of international law and comity should lead a U.S. court to look beyond whether conduct engaged in outside the U.S. has an effect in the U.S., but also that courts must assess the extent to which the interests of other nations might be infringed. The leading authorities have developed several factors to be weighed in conducting this analysis. Because a primary goal of international law principles is the avoidance of conflict, the most critical of these factors is conflict with the law or policy of another nation. Unless outweighed by other factors, conflict with the law or policy of a foreign nation has itself been found a reason to decline the exercise of jurisdiction.

Petitioners urge this Court to endorse expressly the principles of international law and comity developed to date by scholars and in the opinions of the lower courts, which require moderation in the exercise of jurisdiction to apply U.S. law and make conflict with the law and policy of a foreign state a keystone in the analysis. When it applies these principles to the present case, petitioners believe the Court must conclude that the district court correctly declined to exercise jurisdiction over the three London reinsurance claims, and that the court of appeals' reversal of that decision was incorrect.

Only the district court's application of U.S. law gave proper respect to principles of international law. Both courts below concluded that the exercise of jurisdiction over the London

reinsurance claims would create a significant conflict with English law and policy, because application of the U.S. antitrust laws and imposition of the relief sought would usurp the detailed regulatory framework the British Government has put in place for its insurance industry. The court of appeals, however, departed from modern precedent and leading authority to reverse the district court. The court of appeals erroneously gave dispositive weight to the alleged effects of the conduct at issue on U.S. commerce. The court of appeals thus misapprehended or disregarded principles of international law, and failed to acknowledge the impact of conflict on the international legal order and the interests of the foreign state concerned.

Congress decided in 1945 to exempt the business of insurance in the United States from federal antitrust law, on the dual ground that certain types of agreements not generally permitted under the antitrust laws were necessary to the sound conduct of the business of insurance, and that the individual states could more appropriately regulate this industry. It occurred to no one at the time that U.S. antitrust law would be applied to agreements made by foreign insurers acting abroad. To hold foreign insurers subject to the U.S. antitrust laws from which domestic insurers were exempt, as the court of appeals decision permits, would be perverse. Congress could not have intended a result so wholly inconsistent with principles of international law.

ARGUMENT

I. Extraterritorial Jurisdiction By A U.S. Court Must Be Tempered By Restraint To Accommodate Principles Of International Law And Comity And To Avoid Conflict

A. International Law And The Limits On U.S. Jurisdiction

The modern law of the scope of United States jurisdiction over activity centered abroad can be traced to *United States v.*

Aluminum Company of America, 148 F.2d 416, 443-45 (2d Cir. 1945) ("Alcoa").[8] In *Alcoa*, the court held that a system of quotas for imports, although established abroad, was intended to affect the United States market, and that an effect on the United States market sufficient to support subject matter jurisdiction could be inferred from that intent.

Even with the jurisdictional sweep of *Alcoa*, however, Judge Learned Hand expressly noted that Congress must be presumed to have acted against a backdrop of deference to other nations required by international law and custom:

> [W]e are not to read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws."
>
> * * *
>
> Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them.

Id. at 443.

Following *Alcoa*, courts in both the United States and the United Kingdom considered the impact that exercise of legislative jurisdiction by the U.S. would have in the U.K. in the *Nylon Spinners* cases. The American court, in *United States v. Imperial Chemical Industries, Ltd.*, 105 F. Supp. 215 (S.D.N.Y. 1952), ordered the British defendant not to enforce its British patents to exclude imports of nylon into the United Kingdom.

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8 The court, consisting of L. Hand, Swan, and A. Hand, was sitting as a court of last resort, after the Supreme Court was unable to muster a quorum to hear the case. *See* Act of June 9, 1944, c. 239, 58 Stat. 272, now 28 U.S.C. § 2109 (West 1987).

The court moderated the operation of its decree in recognition of the fact that more than one nation can possess jurisdiction over a matter, and that restraint might then be appropriate:

> No provision of this judgement shall operate against I.C.I. for action taken in compliance with any law of . . . any foreign government or instrumentality thereof, to which I.C.I. is at the time being subjected, and concerning matters over which, under the law of the United States such foreign government or instrumentality thereof has jurisdiction.[9]

In three cases involving foreign seamen, this Court held that Congress must be presumed to have acted with respect for principles of international law and comity when it employed general phrases such as "in trade or commerce" in the Sherman Act or "any seaman." *Lauritzen v. Larsen*, 345 U.S. 571 (1953), involved a claim under the Jones Act[10] by a foreign seaman who had signed his ship's articles in New York. This Court, reversing two lower courts, wrote that the exercise of jurisdiction to apply U.S. law must be informed by deference to "a non-national or international maritime law of impressive maturity and universality":

> It has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.
>
> * * *

9 *British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd. (II)*, [1955], Ch. 37 at 53, 3 All E.R. 88. In the English proceeding, the English Court of Appeal ordered the British defendant to honor its English contract granting an exclusive license to another British company, concluding that "the writ of the United States does not run in this country, and if due regard is had to the comity of nations, it will not seek to run here." *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1953] Ch. 19 at 28, [1952] All E.R. 780 (Lord Denning).

10 Jones Act, 46 U.S.C. § 688 (West Supp. 1992).

> It would not be candid to claim that our courts have arrived at satisfactory standards or apply those that they profess with perfect consistency. But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

345 U.S. at 581-83.

Six years later, in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), which involved a claim by a foreign seaman injured in the U.S., the Court rejected a minimum contacts analysis and emphasized that international interests may require restraint in the exercise of jurisdiction:

> The controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations.

358 U.S. at 383. In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), which involved an attempt to assert jurisdiction over foreign seamen by the N.L.R.B., this Court reiterated the presumption that Congress intended to legislate in harmony with international law:

> We therefore conclude . . . that for us to sanction the exercise of local sovereignty under such conditions in this "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed."

372 U.S. at 20-22 (quoting *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957)).

Taken together, this Court's decisions in the *Lauritzen*, *Romero* and *McCulloch* trilogy confirm that the United States cannot exploit every contact with its shores to the full extent of its power. It is not minimum contacts, but the presumed intent of Congress to respect principles of international law and comity, that provides the initial test for application of U.S. regulatory law to foreign-centered conduct or transactions. As Mr. Justice Frankfurter observed, this nation's interests are best served by acting with "respect for the relevant interests of foreign nations in the regulation of [international] commerce as part of the legitimate concern of the international community." *Romero*, 358 U.S. at 382.

The theme that the domestic regulation of international commerce must be undertaken with due regard for the interests of the international community found its next expression in the American Law Institute's *Restatement (Second) of The Foreign Relations Law of the United States* (1965). In section 40, the *Restatement* accepted the view that, before jurisdiction to apply a state's regulatory law could be exercised on the basis of the effects doctrine, the state was "required" to take into account the interests of other concerned states.[11] Section 40 presaged the later work of the lower courts by identifying the cardinal factors to be weighed in assessing the extraterritorial reach of jurisdiction, each of which would weigh against the assertion of jurisdiction over these claims.

11 The text of section 40 provides:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and

The Court has continued to uphold the rule that extraterritorial application of American statutory law should not be presumed without explicit congressional guidance and, hence, has instructed U.S. courts that they are not to apply terms such as "high seas," "the people," "any place" or "foreign commerce" in legislative grants of jurisdiction to wholly foreign events or actors. Most recently, in *EEOC v. Arabian American Oil Co.* ("*Aramco*"), ___ U.S. ___, 111 S. Ct. 1227 (1991), the Court held that Title VII does not apply to actions of an *American* employer taken as to *Americans* employed abroad, notwithstanding the statute's facial application to "commerce" between a state and "any place":

> It is a long-standing principle of American law that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros.*, 336 U.S., at 285, 69 S.Ct., at 577. This "canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained." *Ibid.* It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord. *See McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22, 83 S.Ct. 671, 677-78, 9 L.Ed.2d 547 (1963).

111 S. Ct. at 1230. Without clear evidence of congressional intent, the Court was unwilling to attribute to Congress "a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce." *Id.*[12]

> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.
>
> *Restatement (Second)* § 40.

12 Even the dissent in *Aramco* acknowledged that the Court's strict historical presumption against the extraterritorial application of American law properly "permits the Court to avoid, if possible, the separation-of-powers and international-comity questions associated with construing a

B. *The Importance Of Avoiding Conflict In Assessing Whether The Exercise Of U.S. Antitrust Jurisdiction Is Reasonable*

Until this case, this Court has not had before it an application to U.S. antitrust law of the principles reflected in its decisions. In *Timberlane Lumber Co. v. Bank of America*, the Court of Appeals for the Ninth Circuit explored that issue. In *Timberlane*, the American plaintiffs alleged that a group of Honduran citizens had conspired with Bank of America to drive them out of the lumber business in Honduras, in violation of the Sherman Act. The Honduran lumber was intended for the American market, and Timberlane therefore alleged a "direct and substantial effect on United States foreign commerce." 549 F.2d at 605. Defendants argued that their conduct was beyond the reach of U.S. law because the conduct took place predominantly in Honduras. The district court dismissed the action, and plaintiffs appealed.

The Ninth Circuit expressly rejected the suggestion in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-57 (1909), that the Sherman Act did not apply outside United States territory. The court of appeals continued, however, to consider the *Alcoa* effects doctrine:

> The effects test [as enunciated in *Alcoa*] by itself is incomplete because it fails to consider other nations' interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country. Whether the alleged offender is an American citizen, for instance, may make a big difference; applying American laws to American citizens raises fewer problems than application to foreigners.

549 F.2d at 611-12.

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statute to displace the domestic law of another nation." *Id.* at 1239 (Marshall, J., dissenting). The dissent argued that because "application of United States law to *United States nationals* abroad ordinarily raises considerably less serious questions of international comity than does the application of United States law to *foreign nationals* abroad," a statute could be construed "to apply extraterritorially to United States nationals but *not* to foreign nationals." *Id.* at 1244 (emphasis in original).

Under *Timberlane*, a finding that activity centered abroad has a "substantial and direct" effect on U.S. commerce is the first step in the jurisdictional analysis because without sufficient effects, the assertion of United States regulatory jurisdiction lacks a constitutional foundation. But under *Timberlane*, this finding is only the beginning of the analysis:

> A tripartite analysis seems to be indicated. As acknowledged above, the antitrust laws require in the first instance that there be *some* effect—actual or intended—on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil *violation* of the antitrust laws . . . Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-á-vis those of other nations, to justify an assertion of extraterritorial authority.
>
> It is this final issue which is both obscured by undue reliance on the "substantiality" test and complicated to resolve. An effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority *should* be asserted in a given case as a matter of international comity and fairness.

549 F.2d at 613 (emphasis in original).

The Ninth Circuit set forth a "jurisdictional rule of reason" under which a court would weigh the following factors to assess the propriety of an extraterritorial application of jurisdiction:

> 1. the degree of conflict with foreign law or policy;
> 2. the nationality or allegiance of the parties and the locations or principal places of business of corporations;

3. the extent to which enforcement by either state can be expected to achieve compliance;
4. the relative significance of effects on the United States as compared with those elsewhere;
5. the extent to which there is explicit purpose to harm or affect American commerce;
6. the foreseeability of such effect;
7. the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

549 F.2d at 613-14.

Judge Choy's opinion in *Timberlane* relied on the pioneering work by Professor Kingman Brewster on the extraterritorial application of the antitrust laws, which emphasized the importance of assessing the extent of conflict with the law and policies of foreign states.[13] On appeal after remand the Ninth Circuit, per Judge Sneed, stressed that a significant conflict with foreign law or policy "unless outweighed by other factors in the comity analysis, is itself a sufficient reason to decline the exercise of jurisdiction . . . ." 749 F.2d at 1384.

Three years after *Timberlane*, the Court of Appeals for the Third Circuit applied comity principles to decline to exercise jurisdiction in an action under the Sherman Act. In *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), the Third Circuit set forth its own list of factors it believed courts should employ to weigh competing sovereign interests in economic regulation. Like the Ninth Circuit, the Third Circuit placed degree of conflict with foreign law or policy first, and it endorsed all of the other *Timberlane* factors. The *Mannington Mills* court amplified the list of factors appropriate to comity considerations principally by asking whether the United States would accept the proposed relief if it were applied by a foreign court, and by considering the possible

13 K. Brewster, *Antitrust and American Business Abroad* 466 (1958), *quoted in Timberlane*, 549 F.2d at 614 n.31.

effect of the exercise of jurisdiction on the foreign relations of the United States.[14] Under either set of factors, a court should not exercise jurisdiction over the London reinsurance claims.

In 1987, the American Law Institute published *Restatement (Third) of The Foreign Relations Law of the United States* (1987), which in significant part focused on the relation of international law to the exercise of jurisdiction over transnational activity by national governments and courts. The guiding rule, as set forth in sections 402 and 403 of the *Restatement*, is the principle of reasonableness in the exercise of jurisdiction. In the *Restatement's* view, under international law—and under the law of the United States—even when one of the bases of jurisdiction to prescribe and apply a nation's law is present (*i.e.*, there is either a link of territoriality or a link of nationality), jurisdiction may not be exercised when it would be unreasonable to do so.

The *Restatement* also sets out a list of factors, similar to those proposed by Professor Brewster, *Timberlane* and *Mannington Mills*, to be considered in determining whether the exercise of jurisdiction would be reasonable. These factors focus on the teachings and traditions of the international legal system and on the character of the activity sought to be regulated.[15] Within the framework of the general principle, the

14 The Third Circuit's list of factors included: 1. Degree of conflict with foreign law or policy; 2. Nationality of the parties; 3. Relative importance of the alleged violation of conduct here compared to that abroad; 4. Availability of a remedy abroad and the pendency of litigation there; 5. Existence of intent to harm or affect American commerce and its foreseeability; 6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; 7. If relief is granted, whether a party will be placed in a position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; 8. Whether the court can make its order effective; 9. Whether an order for relief would be acceptable in this country if made by the foreign national under similar circumstances; 10. Whether a treaty with the affected nations has addressed the issue. *Mannington Mills*, 595 F.2d at 1297-98.

15 Section 403(2) of *Restatement (Third)* provides:

> (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(footnote continued)

Restatement sets out rules for exercise of particular types of jurisdiction, such as taxation, securities regulation and antitrust.

The authors of the *Restatement* understood that it is possible that more than one state can have a sufficient basis for exercising jurisdiction to apply its law to the same conduct. In some situations, each state could exercise jurisdiction without interfering with predominant interests of the other. But when the regulatory schemes of the two states applicable to a given activity are in fundamental conflict, the *Restatement* calls for the state with the lesser interest—generally the non-territorial state—to withhold exercise of its jurisdiction.[16] Section 415

(a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

16 Section 403(3) of *Restatement (Third)* provides:

> When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, [including those set out in] Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

applies the principles of sections 403(2) and 403(3) to agreements in restraint of trade.

One thread runs through all the precedents: conflict between the laws and regulatory policies of two states is to be avoided, for two independent reasons. *First*, individual parties should not be placed in the position where by acting in accord with one law, they violate another. *Second*, governments should not be drawn into avoidable clashes by decisions of courts, particularly in disputes in which the governments have not themselves participated and over which they have no control. Moreover, each of these precedents supports the result reached by the district court, which employed a decisional framework honoring the principle that in international commerce, conflict in the application of regulatory jurisdiction should be avoided. The court of appeals failed to recognize this principle, and its decision should be reversed.

II. The Court Of Appeals Misapplied The Sherman Act And Failed To Give Sufficient Weight To This Court's Precedents And Other Governing Authorities

A. The Foreign Trade Antitrust Improvements Act Does Not Affect The Rule That The Exercise Of Extraterritorial Jurisdiction Must Be Reasonable

The court of appeals made a fundamental error in its consideration of the comity principles enumerated in *Timberlane*. The court of appeals interpreted the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (West Supp. 1992),[17] to

17 Section 7 of the Sherman Act, 15 U.S.C. § 6a, enacted on October 8, 1982, as part of the Foreign Trade Antitrust Improvements Act, provides:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

reflect the intent of Congress that a substantial effect in the U.S. was all—or practically all—that mattered in the exercise of jurisdiction: "If a complaint survives the new bar of 15 U.S.C. § 6a because the conduct has a 'direct, substantial, and reasonabl[y] foreseeable effect' on American commerce," the court of appeals wrote, "it is only in an unusual case that comity will require abstention from the exercise of jurisdiction." A-28. This position manifests a complete misunderstanding of both the text of the FTAIA and the intent of Congress.

The FTAIA is a 1982 amendment to the Sherman Act, enacted in response to the perception that American exporters were handicapped by uncertainty about their exposure to antitrust liability if they entered into joint ventures or other types of agreements designed to improve their sales in foreign markets. *See, e.g.*, testimony of Hon. Malcolm Baldrige, Secretary of Commerce, in *Foreign Trade Antitrust Improvements Act*, Hearings before Subcomm'n on Monopolies and Commercial L. of House Comm'n on the Judiciary, at p. 6 (97th Cong., 1st Sess. March 28, 1981). Congress adopted the Export Trading Company Act of 1982, Pub. L. 97-290, 96 Stat. 1233, in order to

> increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers, in particular . . . by modifying the application of the antitrust laws to certain export trade.

15 U.S.C. § 4001(b) (West Supp. 1992).

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for the injury to export business in the United States.

Title IV of the Export Trading Company Act, which became known as the FTAIA, undertook to exempt from the antitrust laws conduct that might be thought to be covered by those laws because it took place in the United States (*i.e.*, based on territorial jurisdiction) but did not have the requisite (*i.e.*, direct and substantial) effect within the United States. *Foreign Trade Antitrust Improvements Act*, Report of House Comm'n on the Judiciary, H.R. No. 686, 97th Cong., 2d Sess., at 10 (Aug. 2, 1982), *reprinted in* 1982 U.S.C.C.A.N. 2495 (hereinafter "House Report"). Thus export transactions were exempt under the FTAIA if they did not injure the domestic economy. Import transactions were left unaffected, except that Congress added the words "direct, substantial and reasonably foreseeable" before the word "effect," to codify the understanding that had emerged from the cases following *Alcoa* rejecting the notion that "minimum contacts" could support extraterritorial jurisdiction. *See* House Report pp. 8-9, 1982 U.S.C.C.A.N. 2493-94.

In addition, Congress clearly contemplated the prospect that courts would weigh the reasonableness of asserting jurisdiction, and thought that *Timberlane* represented the kind of comity analysis that ought to be applied:

> Moreover, the bill [was] intended neither to prevent nor to encourage additional judicial recognition of the special international characteristics of transactions. If a court determines that the requirements for subject matter-jurisdiction are met, this bill would have no effect on the courts' ability to employ notions of comity, *see, e.g., Timberlane* [I], or otherwise to take account of the international character of the transaction.

House Report at 13, 1982 U.S.C.C.A.N. at 2498.

Read in light of this legislative history, the court of appeals' importation of the FTAIA subject matter jurisdiction test into its consideration of comity was wholly unfounded. The London reinsurance claims do not encompass any territorial conduct that would support jurisdiction absent the exemption Congress created. Congress intended to leave otherwise undisturbed the

developing law on the exercise of jurisdiction. Congress did not intend any truncation or alteration of the analysis courts should undertake in assessments of comity, nor would it have made any sense for it to have done so in the context in which the FTAIA was enacted.

The court of appeals' erroneous importation of the FTAIA's test into the comity analysis vitiated the role of the conflict it had found, and infected the court's evaluation of the relevant factors. Its misinterpretation of the statute elevated "effects" to a higher level than all the factors that ordinarily establish the links for the extraterritorial exercise of jurisdiction, such as nationality of the defendants and locus of the conduct. The court of appeals thus effectively reversed the observation of Judge Choy in *Timberlane* that finding an effect in the United States is only the beginning, and not the end, of the analysis. 549 F.2d at 611-12.

B. Comity Principles Require That The Exercise of Jurisdiction Over The London Reinsurance Claims Must Be Declined

i. Application Of The U.S. Antitrust Laws To The London Reinsurance Claims Would Result In Significant Conflict With The Law And Policy Of The United Kingdom

The relief sought against the London reinsurers for their alleged violations of the U.S. antitrust laws invades the regulatory jurisdiction of the British Government. Plaintiffs seek a fundamental reworking of basic practices in the regulated London insurance markets. The district court found, and the court of appeals agreed, that enforcement of the U.S. antitrust laws in this case would supplant the regulatory and competitive framework of the London reinsurance market set in place by the British Government. The British Government, through its repeated appearances *amicus curiae* in these proceedings, concurs, and asks that this conflict be avoided. As stated in its earlier brief, "[T]he conflict in this case arises because plaintiffs ask the U.S. courts to place restrictions on the British industry

which is operating under the British regulatory and competition regime and also to subject British nationals to substantial legal liability for conduct in London which the district court properly found was 'conducted in conformity with English law . . . [for] a legitimate business purpose.' . . . It is for the British Parliament in the light of developments, *e.g.*, in the U.K. insurance industry, to decide whether to change the system". *Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners* at 9 (quoting A-76).

Reinsurance in the London insurance markets is written through the subscription of several underwriters to portions of each risk. *See* A-67. In these markets, the Lloyd's petitioners and the London Company defendants participate in the same business, share the same risks, sign on to the same insurance slips, and negotiate with the same brokers. They are regulated under the same comprehensive British regulatory scheme for insurers. That scheme is designed to assure solvency (and, hence, the reliability and security of insurance), and to protect the continued contributions of this very significant segment of the British economy. *See generally* T. Henry Ellis and James A. Wiltshire, I *Regulation of Insurance in the United Kingdom and Ireland*, Chapter B (1992).

The United Kingdom has chosen to implement its comprehensive regulatory scheme differently for Lloyd's underwriters than for London Company underwriters. The British scheme accommodates the 300-year history of the Lloyd's of London marketplace. It provides for regulation by Lloyd's to safeguard the solvency of Lloyd's underwriting syndicates and the reliability of policies issued in the Lloyd's name, but it also preserves the ultimate authority of Parliament to alter the regulatory framework applicable to the Lloyd's market, and the more immediate authority over the insurance industry of the Department of Trade and Industry. The provisions of law governing Lloyd's specifically are set forth in the Lloyd's Acts 1871-1982.[18]

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18 Petitioners have lodged with the Clerk of the Court copies of the Lloyd's Act 1982, incorporating those sections of the Lloyd's Acts 1871-1951 currently in force.

The Lloyd's Acts have been altered, amended and revised many times by Parliament, most recently in 1982. The guiding spirit of the Lloyd's Act 1982 is one of self-regulation,[19] but still subject to Parliament's ultimate authority, within the framework of the general law and dependent on a high degree of mutual trust among the market's participants. Through its own bylaws and regulations, Lloyd's devotes meticulous attention to safeguarding the security of insurance at Lloyd's by regulating and monitoring the solvency of those who underwrite there, endeavoring to ensure that the amount of insurance underwritten annually by each syndicate does not exceed its capacity, and prohibiting the underwriting of certain types of insurance. For example, with certain exceptions, Lloyd's does not permit the underwriting of coverage for war damage to land-based property risks, on the theory that the accumulation of claims for war-imposed damage on land could destroy the market's solvency. *See* Hugh Cockerell, *Lloyd's of London—A Portrait* 112 (1984).

The London Company defendants named in the London reinsurance claims,[20] each of which is incorporated in the United

19 The Lloyd's Act 1982 was the product of a committee appointed by Parliament under the chairmanship of former British High Court Judge Sir Henry Fisher. The committee's report, entitled *Self-Regulation at Lloyd's: Report of the Fisher Working Party* (May 1980), took note of the unique structure of Lloyd's and concluded:

> **We have no doubt that Lloyd's will be best served by a properly conducted system of self-regulation.** Indeed, we do not see how it could function in anything like its present form under any other system of regulation. Since the continued success of Lloyd's as an international market for insurance is important in the national interest, it is of national importance that Lloyd's should have an efficient system of self-regulation.

Fisher Report at 3 (emphasis in original).

20 The London Company defendants are not petitioners here but have joined this brief as additional parties. They are alleged to have joined in precisely the same agreements and on precisely the same terms as those petitioners named in the Sixth and Eighth claims of the State of California complaint. They are not named in any other aspect of that complaint, although they, with all other defendants, are included in a "global

Kingdom in accordance with the Companies Act 1985, are regulated for solvency, and in other aspects of their business, by the Insurance Companies Act 1982 and other regulations, under the supervision of the Secretary of State for Trade and Industry. *See* J. Butler, et al., *Reinsurance Law* ¶ A.1.1 at A.1.1-2 (1989).[21] The Insurance Companies Act 1982 imposes restrictions on the carrying on of certain classes of the insurance business and regulates transfer of business, insolvency, and winding up. The Act provides wide powers of intervention to the Department of Trade and Industry. The Act governs the form and content of insurance advertisements and requires insurance intermediaries to disclose prescribed information to potential insureds.

In addition to these insurance regulatory Acts, Parliament has created exceptions for British insurers in its laws of general application. As under U.S. law, British law expressly exempts agreements among British insurers on rates or terms and conditions of coverage from application of the Restrictive Trade Practices Act, the relevant English competition law. Restrictive Trade Practices (Services) Order, S.I. 1976 No. 98. JA-258-263. Similarly, the Unfair Contract Terms Act 1977 contains special provisions distinguishing insurers from other entities to which that Act applies.

Disregarding the unique blend of law, custom and policy through which the London reinsurance market operates and the British Government regulates, plaintiffs seek through this action to impose on petitioners a program to be crafted in San Francisco for the underwriting of reinsurance in London. Plaintiffs would have the district court enjoin communications among underwriters in London and between London underwriters and brokers on coverage terms. *See, e.g.*, Cal. Compl. ¶ 171 (enjoining communications among each other regarding

conspiracy" claim added to some subsequently filed complaints and dismissed by both courts below.

21 For a history of the United Kingdom's "comprehensive approach" to regulation of its insurance industry, *see generally* Robert Merkin, *Colinvaux's Law of Insurance* 212 (6th ed. 1990).

forms or terms and conditions of coverage); *id.* ¶ 172 (same but of greater breadth); *see also* Connecticut Complaint ("Conn. Compl.") ¶ 156 (enjoining communications among broker and reinsurer defendants regarding prices, terms or conditions of coverage).[22] These remedies threaten to undermine the unique risk-spreading mechanism of the London marketplace, which permits many large and novel risks to be presented for insurance and reinsurance there. No one, least of all a U.S. court, can predict how the measures on which plaintiffs insist might affect the London insurance and reinsurance markets, whose size, stability and innovation are replicated nowhere.[23]

Furthermore, it is the United Kingdom's position that international law precludes application of U.S. antitrust laws to British subjects for most conduct undertaken in their own country. This position is reflected in Parliament's enactment of the Protection of Trading Interests Act 1980 ("PTIA").[24] Under the PTIA, British courts will not enforce antitrust damage decrees. English law treats multiple damage awards, like punitive damage awards, as penal in nature, and the English courts will not enforce them. Moreover, as both courts below agreed, there is virtually no likelihood that English courts will enforce injunctive decrees entered by American courts directing the conduct of British subjects. *See* A-75-76, citing *Nylon Spinners*; A-30.

The fundamental alterations for which plaintiffs press in these actions cannot be effected without displacing the British Government's regulatory choices. Both courts below understood this, yet they reached opposite conclusions about the wis-

22 The Conn. Compl. is found at JA-57-102.

23 Plaintiffs also overreach with their demand for "divestment." They would have the district court order and enjoin each defendant "to divest itself of any and all reinsurance and brokerage affiliates, subsidiaries or other operations," Cal. Compl. ¶ 177, and to divest itself of all non-reinsurance operations. *Id.* ¶ 179. Like plaintiffs' proposed restructuring of the day-to-day operation of the London reinsurance market, both of these terms would conflict directly with the British Government's judgment about the degree of integration appropriate for the London insurance market.

24 JA-281-290.

dom of permitting the London reinsurance claims to proceed. Given the gravity of the conflict, and the British Government's unequivocal expression of its position on international law, petitioners submit that the district court reached the only correct conclusion.

ii. No Factors Outweigh The Significant Conflict With The Law And Policy Of The United Kingdom

The district court found nothing of sufficient weight in its assessment of other factors to warrant the exercise of jurisdiction. Its decision embodies reasonableness, not only because it avoids conflict, but also because under the totality of other circumstances before it, the exercise of jurisdiction would have tread upon sovereign interests for little or no purpose. In the words of Judge Choy in *Timberlane*, the district court properly found "the interests of the United States . . . too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction." 549 F.2d at 609.

Specifically, the district court found the conduct at issue in the London reinsurance claims, and the actors who took part in it, to be remote from the U.S. A-75. The district court also recognized that, unlike a claim of fraudulent conduct or price-fixing, a legitimate business purpose existed for the conduct complained of. A-76-77 ("The conduct of defendants complained of in these claims was directed primarily at reducing their exposure to certain risks and controlling losses, a legitimate business purpose"). In addition, the district court found that the exercise of jurisdiction would have been futile, because neither injunctive terms seeking to restructure London insurance market operations, nor a treble damages remedy, were likely to be enforced in Britain. Faced with an indisputable risk to foreign relations had it permitted the claims to proceed, the existence of wholly foreign conduct by wholly foreign actors, and the inability to enforce a remedy if one were obtained, the district court was compelled to follow a course that avoided the cost of conflict.[25]

25 Avoidance of that conflict was even more essential here, where plaintiffs do not claim to have purchased the reinsurance products offered by the British defendants and, thus, must find their real relief elsewhere.

The court of appeals did not disagree with the salient features of the district court's analysis. The court of appeals agreed that a significant conflict "with a long-established British policy towards a venerable British trade, the underwriting of insurance" existed:

> The district court found that application of the antitrust laws to the London reinsurance market "would lead to significant conflict with English law and policy." [723 F. Supp.] at 489. The British brief reiterates that conclusion; we do not doubt its accuracy.

A-29, 31. The court of appeals agreed that all of the defendants in the London reinsurance claims are British, A-29-30, a predicate which, alone, raises serious questions of international comity. *Aramco*, ___ U.S. ___, 111 S. Ct. 1244 (Marshall, J., dissenting), discussed in note 12 *supra*; *see also Restatement (Third)* § 403(2)(b). The court of appeals acknowledged that a legitimate business purpose existed for the conduct at issue. A-30-31. The court of appeals also agreed that the decree of a district court could not be enforced abroad, although it otherwise omitted comment on the foreign locus of the conduct. A-30.

Neither court asked, as one would under *Mannington Mills*, how the proposed relief would appear if it had been ordered by a foreign court for application to U.S. insurers for conduct legal in this country and subject to regulation by the 50 states. 595 F.2d at 1287. Had either court examined this factor, it would have found that it weighed heavily against the exercise of jurisdiction, particularly if the party seeking relief were a local government.

Notwithstanding its agreement with the district court on the factors central to the comity analysis, the court of appeals stretched to reach a different result. It focused on the fact that plaintiffs are American, even though the comity inquiry should focus on the nationality of the parties against whom relief is sought. Similarly, it focused on the American parentage of some of the British defendants, even though those parents are not alleged to have participated in the conduct at issue. And it

believed, for some reason, that it could fashion relief through orders directed to "American insurers" (A-30), even though there are no American defendants in the London reinsurance claims.

The court of appeals was obviously overwhelmed by its perception that "substantial" effects had been established to overcome the "new bar" of the FTAIA. With its vision thus obscured, the court ignored the warning of Judge Choy in *Timberlane* and placed "undue reliance on the 'substantiality' test." 549 F.2d at 613. The court of appeals replaced a correct decision applying a jurisdictional rule of reason to avoid unnecessary conflict, with an incorrect decision in which "effects" were determinative. Its ruling should be reversed.

III. Congress Could Not Have Intended To Expose Foreign Insurers To Antitrust Liability Greater Than That To Which U.S. Insurers Are Exposed

In the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.* (West 1976), Congress preserved regulation of the business of insurance to the domain of the states. Throughout hundreds of pages of hearings, congressional committee reports, and contemporaneous comment, there is not the slightest hint that Congress had in mind the additional intent to apply U.S. law to foreign insurers or reinsurers.

It is possible to conclude (1) that neither the domestic insurers nor the foreign insurers are liable—as the district court held; (2) that the domestic insurers may be found liable through further proceedings, on the ground that their alleged conduct comes under the boycott exception to the McCarran-Ferguson Act, but the foreign insurers are not liable because, as argued herein, jurisdiction under the Sherman Act does not reach them; or (3) that both the domestic and the foreign insurers may be found liable, if the domestic insurer petitioners fail on their McCarran Act argument, and the foreign insurers fail on the arguments made in this brief. It is not possible to conclude, as the court of appeals suggests, A-31, that (4) even if the domestic insurers are not liable because their alleged conduct

is immunized by the McCarran-Ferguson Act, the foreign defendants may nevertheless be liable for analogous conduct undertaken in Britain. No conceivable intent of Congress would support a conclusion that would discriminate against foreign insurers; indeed, consistent with principles of international law and the precedents discussed above, Congress presumably intended the contrary.

CONCLUSION

Six years ago in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113-116 (1987), this Court called for consideration of the procedural and substantive policies of other nations in determining whether exercise of adjudicatory jurisdiction by a California court over foreign parties was acceptable and lawful. This case involves the exercise of jurisdiction by another court in California, but the question is much more serious—and much more directly affects the interests of the foreign nation concerned—because the exercise of jurisdiction would involve not just haling defendants before a court in the United States, but applying United States law to their foreign conduct, which is subject to pervasive economic regulation by a foreign sovereign. Permitting these claims to proceed would give the plaintiffs license to reorganize regulated markets worldwide—in Munich, Zurich, Tokyo and elsewhere.

The interests of foreign states, as well as the United States' interest in its foreign relations policies, will best be served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case. Upon such a careful inquiry here, it is clear that the district court was correct, and that the London reinsurance claims should be dismissed.

For the reasons stated, the decision of the court of appeals should be reversed, and the decision of the district court dismissing the London reinsurance claims should be reinstated.

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November 1992

Nos. 91-1111 and 91-1128

IN THE

Supreme Court of the United States

October Term, 1992

HARTFORD FIRE INSURANCE CO., et al.,
Petitioners,

v.

STATE OF CALIFORNIA, et al.,
Respondents.

MERRETT UNDERWRITING AGENCY
MANAGEMENT LIMITED, et al.,
Petitioners,

v.

STATE OF CALIFORNIA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED IN NO. 91-1128

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November 19, 1992

QUESTIONS PRESENTED

1. Does a United States court have subject matter jurisdiction over claims against a foreign defendant acting with its own nationals on its own soil engaged in business conduct regarded as lawful and necessary in its own country, where there is no conduct in or into the United States and the conduct is not intended to wrong any United States plaintiff?

2. Does international comity compel a United States court to abstain from exercising extraterritorial jurisdiction over claims against a foreign defendant acting with its own nationals on its own soil engaged in business conduct regarded as lawful and necessary in its own country, where there is no conduct in or into the United States and the conduct is not intended to wrong any United States plaintiff?

PARTIES TO THE PROCEEDING

This case involves complaints by nineteen states and numerous private plaintiffs that were consolidated for pretrial purposes by the Judicial Panel on Multi-District Litigation in MDL Docket No. 767.

Plaintiffs in the consolidated proceeding, who were also appellants in the Court of Appeals for the Ninth Circuit, were:

States: The States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, Ohio, Pennsylvania, Washington, West Virginia, and Wisconsin.

State or Local Government Entities, Listed by State:

Alabama: City of Mobile; City of Birmingham

California: City of Lafayette; City and County of San Francisco; County of San Benito

Louisiana: City of Baton Rouge; City of New Orleans; City of Slidell; City of Nachitoches; City of Eunice

Massachusetts: Town of Hanover; Town of Milford

Montana: County of Teton

New York: Roosevelt Island Operating Authority, Inc., Village of Croton; Village of Lake Success

Ohio: Township of Jackson; County of Hardin

Pennsylvania: County of Schuylkill; City of Altoona; City of York; Borough of Chambersburg

Washington: County of Cowlitz

West Virginia: City of Clay; County of Hancock; County of Mineral; County of Wirt

Private Plaintiffs: Big D Building Supply Corp.; Anastasios Markos, T/A Municipal Exxon; Bay Harbor Park Homeowners Ass'n, Inc.; Environmental Aviation Sciences, Inc.; Carlisle Day Care Center, Inc.; Bensalem Township Authority; Keyboard Communications, Inc.; Glabman Paramount Furniture Mfg. Co., Inc.; Les-Ray Bobcat, Inc.; Jerry Grant Chemical Associates, Inc.; Durawood, Inc.; Carmella M. "Boots" Liberto Trading as R.J. Liberto, Inc.; Henry L. Rosenfeld; Acme Corrugated Box Co., Inc.; P&J Casting Corp.; Ace Check Cashing, Inc.

Defendants in the consolidated proceeding, who were also appellees in the Ninth Circuit, were the following:

Allstate Insurance Company; Aetna Casualty & Surety Company; CIGNA Corporation; General Reinsurance Corporation; Hartford Fire Insurance Company; Insurance Company of North America; Insurance Services Office, Inc.; Reinsurance Association of America; Merrett Underwriting Agency Management Limited; Three Quays Underwriting Management Limited; Janson Green Management Limited; Murray Lawrence & Partners; D.P. Mann Underwriting Agency Limited; Robin A.G. Jackson; Peter N. Miller; Edwards & Payne (Underwriting Agencies) Limited; Sturge Reinsurance Syndicate Management Limited; Thomas A. Greene & Company, Inc.; Ballantyne, McKean & Sullivan Limited; C.J.W. (Underwriting Agencies) Limited (sued herein as C.J. Warrilow-Hine & Butcher, Ltd.); Lambert Brothers (Underwriting Agencies) Limited (sued herein as J. Brian Hose & Others, Ltd.); R.K. Carvill & Co., Ltd.; Continental Reinsurance Corporation (U.K.) Limited; Unionamerica Insurance Company, Ltd.; CNA Re (U.K.), Ltd.; Kemper Reinsurance London, Ltd.; Constitution Reinsurance Corporation; Mercantile & General Reinsurance Company of America; Prudential Reinsurance Company; North America Reinsurance Company; Winterthur Swiss Insurance Company; Excess Insurance Company, Ltd.; Excess Insurance Group, Ltd.; Terra Nova Insurance Company Limited.

STATEMENT PURSUANT TO RULE 29.1

Sturge Reinsurance Syndicate Management Limited, successor in interest to Oxford Syndicate Management Ltd. (sued herein as K.F. Alder & Others (U.A.) Ltd.), is wholly owned by Sturge Group PLC.

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STATE OF CALIFORNIA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED IN NO. 91-1128

Petitioner Sturge Reinsurance Syndicate Management Limited, successor in interest to Oxford Syndicate Management Ltd. (sued herein as K.F. Alder & Others (U.A.) Ltd.), respectfully submits this brief on the merits.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 938 F.2d 919 (9th Cir. 1991). A-1-31.[1] The opinion of the District Court for the Northern District of California is reported at 723 F. Supp. 464 (N.D. Cal. 1989). A-32-83.

JURISDICTION

The opinion of the Court of Appeals was entered on June 18, 1991. Petitioner filed a timely petition for rehearing and suggestion for rehearing *en banc*, which the Court of Appeals denied on October 15, 1991. The Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit was filed on January 13, 1992. This Court granted certiorari in No. 91-1128 on October 5, 1992. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition involves Sections 1 and 6a of the Sherman Act, 15 U.S.C. §§ 1 and 6a, respectively. Section 1 of the Sherman Act was enacted July 2, 1890. Section 6a of the Sherman Act was enacted October 8, 1982, as part of the Foreign Trade Antitrust Improvements Act. The full texts of these provisions are reproduced in the Petition Appendix at A-93.

STATEMENT OF THE CASE

This is a massive antitrust case in which American plaintiffs have extended a global dragnet, trying to sweep within the

1. Numbers following the letter "A" denote reference to the Appendix to the Petition for Certiorari in No. 91-1128 (the "Petition Appendix").

jurisdiction of United States courts and United States regulatory law, a foreign defendant, K.F. Alder, engaged in necessary and normal acts required to conduct business in the British reinsurance market.

A. Nature Of The Case

These consolidated actions were filed by nineteen states and numerous private plaintiffs, all of whom sue as consumers of commercial general liability ("CGL") insurance.[2] In addition, the states sue as *parens patriae*. JA-6[3] (Cal. Compl.); JA-58 (Conn. Compl.). The complaints name as defendants a number of primary insurers who are major providers of CGL insurance in the United States. The remaining defendants are entities and individuals consisting of both domestic and foreign reinsurance companies, underwriters at Lloyd's of London ("Lloyd's") who wrote reinsurance and retrocessional coverage, Lloyd's brokers and United States trade organizations of insurers and reinsurers. Plaintiffs allege violations of federal antitrust law and state laws based on alleged

2. The state complaints fall into two groups depending on when they were filed. The first round of complaints were filed by Alabama, Arizona, California, Massachusetts, New York, West Virginia, and Wisconsin. Citations to these complaints are to the California Complaint ("Cal. Compl."). The second round of complaints were filed by Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Minnesota, Montana, New Jersey, Ohio, Pennsylvania, and Washington. Citations to these complaints are to the Connecticut Complaint ("Conn. Compl."). The private complaints track the state complaints. A-37-38. Subsequent to the proceedings before the Ninth Circuit, a complaint was filed by Florida. The Florida complaint is substantially similar to the other states' complaints.

3. Numbers following the letters "JA" denote reference to the Joint Appendix.

conspiracies to restrict the availability of CGL insurance and reinsurance[4] in the United States.

Petitioner Sturge Reinsurance Syndicate Management Limited, successor in interest to Oxford Syndicate Management Ltd. (sued herein as K.F. Alder & Others (U.A.) Ltd.) ("K.F. Alder"), is a foreign company with its principal place of business in London, England. *See* JA-11, 13 (Cal. Compl. ¶¶ 4(t), 12); JA-61, 68 (Conn. Compl. ¶¶ 4(h), 25). K.F. Alder manages syndicates of underwriters who provide reinsurance in the Lloyd's of London marketplace.

The heart of plaintiffs' claims, as consumers of primary insurance, is the manner in which primary insurance in the United States is being written. Plaintiffs then reach beyond the primary insurance marketplace and allege that agreements in the reinsurance and, even more remotely, the retrocessional reinsurance[5] markets affected the availability of primary insurance in the United States. This brief addresses the two "London reinsurance claims" brought against K.F. Alder and other British defendants.[6] *See* JA-45-46

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4 Reinsurance is insurance for insurers. JA-10 (Cal. Compl. ¶ 4(o)); JA-63 (Conn. Compl. ¶ 4(p)).

5 Retrocessional reinsurance means reinsurance of the business of reinsurers. JA-63 (Conn. Compl. ¶ 4(r)).

6 The other British defendants named in these claims consist of individual underwriters at Lloyd's, other agencies which manage syndicates of underwriters, London insurance companies ("London Market Companies") and London reinsurance brokers. The other British defendants in these claims are: Merrett Underwriting Agency Management Limited, Murray Lawrence & Partners, D.P. Mann Underwriting Agency Limited, Robin A.G. Jackson, Edwards & Payne (Underwriting Agencies) Limited, C.J.W. (Underwriting Agencies) Limited, Unionamerica Insurance Co., Ltd., Terra Nova Insurance Co., Ltd., CNA Re (U.K.), Ltd., Ballantyne, McKean & Sullivan, Ltd., Excess (continued...)

(Cal. Compl. ¶¶ 136-40); JA-94-97 (Conn. Compl. ¶¶ 130-39).[7] These claims charge that alleged agreements among K.F. Alder and other foreign reinsurers defining the coverage terms for reinsurance and retrocessional reinsurance that they jointly underwrote in the Lloyd's market violate United States antitrust law.

K.F. Alder and the other British defendants moved to dismiss the London reinsurance claims in the District Court on the grounds of international comity, lack of subject matter jurisdiction, antitrust immunity under the McCarran Ferguson Act, 15 U.S.C. §§ 1011-1015, and lack of standing. A-40-41. The other British defendants also moved to dismiss certain other claims that do not name K.F. Alder on the same grounds. A-65-66. After both sides were given an ample opportunity to develop and marshall the facts,[8] the District Court dismissed all of these claims, including the London reinsurance claims, on the grounds of international comity. A-77-78. The Court of Appeals reversed and remanded these claims. A-31. This Court granted certiorari on October 5, 1992.

B. Factual Background

The following statement of the pertinent facts is drawn from the allegations of the complaints as characterized by the Court of

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6 (...continued)
Insurance Group, Ltd. and Kemper Reinsurance London, Ltd. A-39-40. Unlike many of these defendants, K.F. Alder is not named in the claims alleging direct manipulation of the primary insurance marketplace.

7 K.F. Alder is named in all of the second round complaints except Alaska's. A-40 n.10.

8 The filing of the complaints followed two year investigations conducted by the regulatory agencies of several states. Significantly, the District Court gave the parties a full opportunity to conduct any discovery necessary to bring or respond to the motions. A-34, 78.

Appeals and the District Court. The District Court found that there were no factual disputes material to its ruling, A-79, and the Court of Appeals adopted the District Court's statement of the facts. A-9.

1. Primary Insurance

CGL insurance protects the insured against the risk of liability to third parties for bodily injury or property damage. JA-8 (Cal. Compl. ¶ 4(a)); JA-60 (Conn. Compl. ¶ 4(b)). It is purchased by businesses, non-profit entities and governmental units. JA-8 (Cal. Compl. ¶ 4(a)); JA-60 (Conn. Compl. ¶ 4(b)). CGL insurance is written predominately, but not exclusively, on standard policy forms written by the Insurance Services Office ("ISO"). JA-9, 19 (Cal. Compl. ¶¶ 4(k), 38, 41); JA-60, 73-74 (Conn. Compl. ¶¶ 4(e), 47, 50). ISO is an association of more than one thousand property and casualty insurers, including the primary insurers named in this suit. JA-9, 19 (Cal. Compl. ¶¶ 4(k), 38); JA-60 (Conn. Compl. ¶ 4(e)). ISO gathers statistical data to support rate-making and promulgates and seeks state approval of forms used in underwriting CGL insurance. JA-19-20 (Cal. Compl. ¶¶ 38-45); JA-73-74 (Conn. Compl. ¶¶ 47-54). Plaintiffs allege that certain defendants, *but not K.F. Alder*, conspired to eliminate or limit certain types of coverages provided on the ISO forms for CGL insurance, including, pollution,[9] occurrence[10] and long-tail coverage.

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9. Prior to 1986, the ISO CGL policy excluded all coverage for pollution claims, except where the discharge of pollutants was "sudden and accidental." The 1986 ISO CGL form contained an absolute pollution exclusion barring coverage for all pollution damage. JA-9-23 (Cal. Compl. ¶¶ 4(g), 60); JA-62, 76 (Conn. Compl. ¶¶ 4(n), 64).

10. Under an "occurrence-based" policy, an insured is covered for claims arising out of occurrences (*i.e.* fortuitous damage) during the policy period, no matter when the claims are presented. JA-8 (Cal. Compl. ¶ 4(b)); JA-62 (Conn. Compl. ¶ 4(m)). "Occurrence-based" policies (continued...)

2. Reinsurance And Retrocessional Reinsurance

Primary insurers limit their financial exposure by purchasing reinsurance. JA-10, 17 (Cal. Compl. ¶¶ 4(o), (p), 27); JA-63-64 (Conn. Compl. ¶ 4(p), (w)). There are several markets for reinsurance, including the United States, London and the European continent. JA-17 (Cal. Compl. ¶ 30). In turn, reinsurers look to retrocessional reinsurers to share their risk. JA-63 (Conn. Compl. ¶ 4(r)).

a. The London Reinsurance Marketplace

The London reinsurance market centers around the market at Lloyd's. *See Travelers Indem. Co. v. Booker*, 657 F. Supp. 280, 282 (D.D.C. 1987); *Edinburgh Assurance Co. v. R.L. Burns Corp.*, 479 F. Supp. 138, 144, (C.D. Cal. 1979), *aff'd in part and rev'd in part on other grounds*, 669 F.2d 1259 (9th Cir. 1982). Lloyd's is not a company and does not underwrite insurance. Rather, it is an insurance marketplace or exchange in London where syndicates of underwriters transact business. JA-11 (Cal. Compl. ¶ 4(t)); JA-61 (Conn. Compl. ¶ 4(h)). *See Booker*, 657 F. Supp. at 282; *Edinburgh Assurance Co.*, 489 F. Supp. at 144. In the Lloyd's marketplace, risks are assumed by individual investors or underwriters. Underwriters are organized into syndicates which are managed by agencies such as K.F. Alder.

The purchase and sale of insurance occurs on the floor of the underwriting room at Lloyd's, or in the offices of independent

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10.(...continued)
expose insurers to "long-tail risks" that may give rise to claims long after the policy period. JA-9 (Cal. Compl. ¶ 4(h)); JA-64 (Conn. Compl. ¶ 4(v)). On the other hand, under a "claims-made" policy coverage is limited to claims made during the policy period regardless of when the damage out of which the claim arose took place. JA-8 (Cal. Compl. ¶ 4(c)); JA-60 (Conn. Compl. ¶ 4(a)).

insurance companies in London (*i.e.* London Market Companies). *See Booker*, 657 F. Supp. at 282; *Edinburgh Assurance Co.*, 479 F. Supp. at 144. Syndicates of underwriters authorize a single underwriter to accept risks on their behalf and bind them to coverage terms.

Coverage can be placed at Lloyd's only through a Lloyd's broker. JA-17 (Cal. Compl. ¶ 32); JA-61 (Conn. Compl. ¶ 4(h)). The broker approaches underwriters representing various syndicates on the floor of Lloyd's in order to obtain subscriptions by underwriters for portions of the proposed risk. JA-11 (Cal. Compl. ¶ 4(u)); JA-61 (Conn. Compl. ¶4(g)). Each underwriter makes the individual decision whether to underwrite a portion of the risk. *See Booker*, 657 F. Supp. at 283; *Edinburgh Assurance Co.*, 479 F. Supp. at 145. "A Lloyd's policy may be underwritten by dozens of individual syndicates, each sharing a portion of the risk." JA-61 (Conn. Compl. ¶ 4(h)).

The form of reinsurance at issue in the London reinsurance claims is "treaty" reinsurance, JA-17 (Cal. Compl. ¶ 27), in which reinsurance companies agree to indemnify the party seeking reinsurance (the "cedent") for a defined portion of the risks to be assumed by the cedent in a given "book of business" during the treaty period. JA-10, 17 (Cal. Compl. ¶¶ 4(p), 27); JA-64 (Conn. Compl. ¶ 4(w)). *See generally Unigard Sec. Ins. Co. v. North River Ins. Co.*, 762 F. Supp. 566, 572 n.2 (S.D.N.Y. 1991), *appeal pending*, No. 91-7534 (2d Cir. filed May 24, 1991). Treaty reinsurers do not deal directly with the consumers of primary insurance. A-68.

By its nature, treaty reinsurance involves the underwriting of extremely large risks. The spreading of these large risks in the London reinsurance market necessarily requires numerous subscribers to each treaty. JA-11, 17 (Cal. Compl. ¶¶ 4(u), 28, 31); JA-61 (Conn. Compl. ¶ 4(g)). As a result, treaty reinsurance requires negotiations over the terms and conditions on which risks

will be accepted and insured among the numerous subscribers. A-68; JA-11, 17 (Cal. Compl. ¶¶ 4(u), 28, 31); JA-61 (Conn. Compl. ¶ 4(g)). This treaty reinsurance product could not be offered without agreement among the numerous reinsurers as to the terms and conditions on which they will jointly underwrite risks.

b. Regulation Of The London Reinsurance Marketplace

The London reinsurance marketplace is subject to the regulatory and competitive framework established by the British government. In 1871, by a statute known as the "Lloyd's Act," Parliament established the Society of Lloyd's and empowered it to regulate the marketplace composed of its members. In the unique self-regulatory mechanism within Lloyd's, the Lloyd's governing body continues to be empowered to exercise quasi-governmental authority in regulating the activity of its members. Lloyd's Acts, 1871-1982.[11]

Taking account of the fact that reinsurance in the Lloyd's marketplace can be made available only by allowing numerous reinsurers to agree to the terms and conditions on which they will jointly underwrite risks, British restrictive practices regulation expressly permits agreements among British insurers, reinsurers, and retrocessionaires relating to the provision of insurance services. *See* A-73; JA-263 (Restrictive Trade Practices (Services) Order 1976, S.I. 1976 No. 98, Schedule ¶ 8); § 2 Competition Act of 1980, vol. 47 Trade & Industry (PT 1). Indeed, as the District Court found, the alleged agreements among the British defendants, including K.F. Alder, were "openly conducted in conformity with English law" and were "directed primarily at reducing [the British defendants']

11. The Lloyd's Act of 1982, which incorporates those sections of the Lloyd's Acts of 1871-1982 that are currently in force, has been lodged with the Clerk of the Court.

exposure to certain risks and controlling losses, a legitimate business purpose." A-73, 76.

C. The Complaints

The complaints allege a number of conspiracies and agreements which purportedly violate United States antitrust law. The vast majority of plaintiffs' federal antitrust claims do not name K.F. Alder as a defendant.

Plaintiffs are United States consumers of primary insurance from United States insurers and their claims principally concern the terms of this buyer-seller relationship. Plaintiffs reach out to bring members of the British industry before the Court by alleging that the availability of reinsurance, JA-18 (Cal. Compl. ¶ 34); JA-63 (Conn. Compl. ¶ 4(p)), and even more remotely the availability to reinsurers of retrocessional reinsurance, JA-48-49 (Cal. Compl. ¶¶ 149-50); JA-96-97 (Conn. Compl. ¶¶ 138-39), has an effect on the ability and willingness of United States insurers to provide primary insurance in the United States. The complaints admit, and the District Court recognized, that there are a number of markets other than the Lloyd's market for reinsurance. A-68; JA-17 (Cal. Compl. ¶ 30).

A review of the allegations in the complaints reveals that K.F. Alder, a British subject, is a peripheral defendant that engaged in alleged conduct exclusively in London, which was permitted within the framework of the British insurance regulatory system and was necessary conduct customarily taken among risk-sharers. As the complaints make clear, K.F. Alder was brought into the case solely as a participant in the Lloyd's reinsurance market and not because of any alleged relationship with plaintiffs (or with any other insurance consumer) or because of any conduct undertaken in the United States. The allegations against K.F. Alder—that it allegedly agreed with other British defendants concerning the terms of reinsurance in the Lloyd's reinsurance market—are only tangentially

related to the core complaint here, namely, the availability of CGL insurance in the United States.

1. The London Reinsurance Claims

K.F. Alder is named as a defendant only in the London reinsurance claims.[12] JA-45-46 (Cal. Compl. ¶¶ 136-40); JA-94-97 (Conn. Compl. ¶¶ 130-39). The London reinsurance claims are directed *solely* against London-based defendants and arise from alleged activity *entirely* within the London reinsurance and retrocessional reinsurance markets. There is no allegation of any activity in the United States by K.F. Alder. There is no allegation as to K.F. Alder of any agreement concerning the underwriting (or refusal to underwrite) insurance for consumers. The London reinsurance claims challenge the legality of alleged agreements among the British defendants, including K.F. Alder—joint venturers in worldwide reinsurance treaties—as to the coverage terms and conditions on which they were willing to underwrite risks.

Plaintiffs allege that the British defendants, including K.F. Alder, agreed that their North American casualty reinsurance treaties would exclude pollution coverage. JA-45 (Cal. Compl. ¶¶ 138-39); JA-94-95 (Conn. Compl. ¶¶ 132-33). No boycott, coercion or intimidation is alleged. A-39-40.

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12. K.F. Alder is named in only one other count of the various complaints. JA-88-90 (Conn. Compl. ¶¶ 115-19). In that claim, plaintiffs allege a "global conspiracy" among all 32 defendants. The District Court dismissed the global conspiracy claim on the ground that it "merely lumps together the separate conspiracies elsewhere alleged without any allegation indicating how the separate conspiracies became a single global conspiracy." A-64-65. As to K.F. Alder, the global conspiracy claim was based entirely on K.F. Alder's alleged participation in the London reinsurance claims. The dismissal was affirmed by the Court of Appeals with leave to amend. A-26-27. It is therefore not before this Court.

In the second round of complaints, plaintiffs allege that the British defendants, including K.F. Alder, agreed not to underwrite retrocessional coverages for risks that did not contain a pollution exclusion in the original property insurance coverage.[13] JA-96 (Conn. Compl. ¶¶ 137-38).

K.F. Alder is a British company, wholly owned by British nationals. There is no allegation in the complaints that K.F. Alder has any parent, subsidiaries or affiliates in the United States. K.F. Alder's principal place of business is in London, England. JA-11, 13 (Cal. Compl. ¶¶ 4(t), 12); JA-61, 68 (Conn. Compl. ¶¶ 4(h), 25). With respect to the claims at issue in this case, K.F. Alder operates solely in the Lloyd's reinsurance market. K.F. Alder provides reinsurance on a global basis, in London, for London reinsurers that reinsure United States based and other risks. In fact, there is no allegation in the complaints that K.F. Alder provides CGL insurance in the United States. Moreover, there is not a single allegation that K.F. Alder performed any act in the United States in furtherance of any alleged conspiracy. The sole specific conduct allegation against K.F. Alder is that it attended a single meeting in London along with certain of the British defendants at which they allegedly agreed to the terms on which they would jointly underwrite reinsurance coverages. JA-32 (Cal. Compl. ¶¶ 94-95); JA-84-85 (Conn. Compl. ¶¶ 98-99). As the District Court found, there were legitimate business reasons for the British defendants, including K.F. Alder, to join together and agree to the terms on which they would underwrite risks. A-76-77.

13. This claim in the Connecticut Complaint is similar to a claim in the California Complaint. JA-47-49 (Cal. Compl. ¶¶ 146-50). However, K.F. Alder is not named as a defendant in this claim of the California Complaint or the other first round complaints.

2. The Federal Antitrust Claims That Do Not Involve K.F. Alder

Plaintiffs allege a conspiracy among certain defendants *(but not K.F. Alder)* to limit the availability of certain coverages—namely, pollution and long-tail coverages—under CGL insurance policies written in the United States for United States risks. Plaintiffs allege a conspiracy among the four primary insurer defendants and others *(but not K.F. Alder)* to manipulate the form development process of ISO for CGL policy forms to limit the available coverage. JA-36-42 (Cal. Compl. ¶¶ 112-130); JA-90-92 (Conn. Compl. ¶¶ 120-24). Plaintiffs allege that certain primary insurers pressured ISO to change its proposed form for CGL insurance for pollution losses. JA-24 (Cal. Compl. ¶¶ 61-62); JA-76-77 (Conn. Compl. ¶¶ 65-66). Plaintiffs allege that after this attempt failed, certain primary insurers allegedly met or communicated with, and encouraged, certain reinsurer defendants *(but not K.F. Alder)* to coerce ISO to adopt the primary insurers' demands and to boycott the broader CGL forms. JA-24-26 (Cal. Compl. ¶¶ 61-62, 64, 69-70); JA-77-79 (Conn. Compl. ¶¶ 65-66, 68, 73-74).

Secondarily, plaintiffs allege that the availability of reinsurance has an effect on the ability and willingness of United States insurers to provide primary insurance in the United States. JA-18 (Cal. Compl. ¶ 34); JA-63 (Conn. Compl. ¶ 4(p)). Plaintiffs allege that certain reinsurers, brokers and reinsurance trade organizations *(but not K.F. Alder)* engaged in a conspiracy to restrict the terms under which reinsurance coverage would be provided for CGL risks and to refuse to reinsure CGL risks on occurrence forms by, among other things, coercion and intimidation of primary insurers. JA-43-44 (Cal. Compl. ¶¶ 131-35); JA-92-94 (Conn. Compl. ¶¶ 125-29).

Tertiarily, the plaintiffs allege a conspiracy to restrict the terms and conditions under which insurance coverages would be available

to purchasers of commercial umbrella and excess insurance.[14] Plaintiffs allege that three of the primary insurers, ISO and certain reinsurers *(but not K.F. Alder)* agreed to, and promulgated, model forms for umbrella and excess insurance. JA-46-47 (Cal. Compl. ¶¶ 141-45); JA-97-98 (Conn. Compl. ¶¶ 140-44).

Allegedly in furtherance of these conspiracies, plaintiffs cite numerous acts by the defendants *(but not K.F. Alder)* in the United States. For example, plaintiffs allege that certain London reinsurers *(but not K.F. Alder)* "threatened a boycott of North American CGL risks" unless the ISO met their demands to change the ISO CGL insurance forms. JA-26 (Cal. Compl. ¶ 74); JA-79 (Conn. Compl. ¶ 78). Plaintiffs also allege that certain London reinsurers attended an ISO Executive Committee meeting and presented their "agreed upon positions that there would be changes in the CGL forms or no reinsurance." JA-27-29 (Cal. Compl. ¶¶ 78-82); JA-80-81 (¶¶ 82-86). There is no allegation that K.F. Alder attended that meeting. Plaintiffs allege that representatives of certain London reinsurers made various public announcements to "present their agreed upon position that Lloyd's of London was withdrawing entirely from the business of reinsuring primary U.S. insurers who wrote on the occurrence form." JA-31 (Cal. Compl. ¶ 89); JA-83 (Conn. Compl. ¶ 93). There is no allegation that K.F. Alder made any such pronouncements.

3. The Relief Requested By Plaintiffs

The complaints seek a radical restructuring of the British reinsurance industry as well as compensatory damages. Plaintiffs ask the District Court to prohibit each and every defendant insurer and

14 Excess insurance is a higher level of indemnity protection that sits on top of either a self-insurance program or a primary insurance policy. Umbrella coverage is a specialized form of excess insurance. JA-33 (Cal. Compl. ¶ 101); JA-86 (Conn. Compl. ¶ 105).

reinsurer, including K.F. Alder, from making any public announcements regarding product restrictions, pricing behavior or loss reserve changes. JA-52 (Cal. Compl. ¶ 167). Plaintiffs request that all defendant reinsurers, including K.F. Alder, be enjoined from communicating, outside of a formal meeting of a trade organization, concerning rates, pricing, forms or other terms of insurance or reinsurance. JA-53 (Cal. Compl. ¶ 172). Plaintiffs further request that the District Court order each defendant underwriter at Lloyd's, including K.F. Alder, and each London Market Company to withdraw certain terms and conditions of coverage they have established in London in the exercise of their business judgment. JA-54 (Cal. Compl. ¶ 174). Plaintiffs also request the District Court to monitor the compliance of all defendants, including K.F. Alder, with the United States antitrust laws for the next ten years. JA-55 (Cal. Compl. ¶ 181).

D. The District Court's Decision

K.F. Alder, together with the other British defendants named in the London reinsurance claims, moved in the District Court for the Northern District of California to dismiss the London reinsurance claims for, *inter alia*, lack of subject matter jurisdiction and on the grounds of international comity. Accepting plaintiffs' factual allegations as true, A-79, the District Court dismissed these claims.[15] The District Court (Schwarzer, J.) held that there was subject matter jurisdiction under the antitrust laws based on plaintiffs' allegations that the conduct of the British defendants had a direct effect on United States commerce. A-69-71. The District Court declined, however, to exercise that jurisdiction under

15 In addition, the District Court dismissed the pendent state law claims against the British defendants, including K.F. Alder, to the extent they were based on the conduct alleged in the London reinsurance claims. A-78.

principles of international law and comity applying the analysis set forth in *Timberlane Lumber Co. v. Bank of America.*[16]

The District Court found a significant conflict between plaintiffs' suits and British law and policy. After assessing this and each of the other factors set forth in *Timberlane*, the District Court concluded that the "conflict with English law and policy which would result from the extra-territorial application of the antitrust laws in this case is not outweighed by other factors." A-77-78.

E. The Ninth Circuit's Decision

The Court of Appeals for the Ninth Circuit reversed the District Court's dismissal of the London reinsurance claims. The Court of Appeals agreed with the District Court that there was a business or economic justification for the alleged activity by the foreign reinsurer defendants. A-31. In addition, the Court of Appeals agreed with the District Court that the exercise of jurisdiction would result in "conflict with a long-established British policy towards a venerable British trade, the underwriting of insurance." A-31. Nevertheless, the Court of Appeals ruled that the dismissal on grounds of comity was improper as to all defendants and reversed that dismissal.

As an initial matter, the Court of Appeals held that the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (the "FTAIA") had limited the normal comity analysis required by *Timberlane*, A-28, and thus, by necessary implication *expanded* the reach of the Sherman Act. The Court of Appeals stated that if a "complaint survives the new bar of [the FTAIA (which limits foreign plaintiffs' suits)] . . . it is only in an unusual case that comity will require abstention from the exercise of jurisdiction." *Id.*

16. 549 F.2d 597 (9th Cir. 1976), *aff'd after remand*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).

The Court of Appeals then reweighed the *Timberlane* factors and held that the "significant conflict with English law and policy" was outweighed by other *Timberlane* factors. A-29-31.

In conducting its analysis, the Court of Appeals did not consider the very different situations of the different British defendants, despite important factual differences among them. This oversight was greatly to the detriment of K.F. Alder, for the factors weigh decidedly in K.F. Alder's favor.[17]

17. The British defendants include individual Lloyd's underwriters, independent syndicates of underwriters at Lloyd's and London Market Companies as well as London brokers. Each individual, each syndicate at Lloyd's and each of the London Market Companies is a separate and independent entity. First, "Lloyd's" is not an insurance company but rather an "insurance marketplace or exchange in London, England, where syndicates transact their business." JA-11, 17 (Cal. Compl. ¶¶ 4(t), 31); JA-61 (Conn. Compl. ¶ 4(h)); *see also Booker*, 657 F. Supp. at 282; *Edinburgh Assurance Co.*, 489 F. Supp. at 144. The plaintiffs allege that these syndicates, including K.F. Alder, are "separately capitalized, independently operated, competing firms." JA-17 (Cal. Compl. ¶ 31); JA-64 (Conn. Compl. ¶ 4(u)). Furthermore, the London Market Companies are insurance companies located in London that are *not* a part of the Lloyd's marketplace. JA-11 (Cal. Compl. ¶ 4(v)); JA-62 (Conn. Compl. ¶ 4(i)). Finally, although the Court of Appeals only found that the London Market Companies (but not the independent syndicates of underwriters at Lloyd's) were subsidiaries of American corporations, A-10, it nevertheless used this fact to retain jurisdiction over K.F. Alder and other Lloyd's defendants. A-29-30. Here too, the Court of Appeals failed to recognize that K.F. Alder, unlike some of the other British defendants, is not (with the exception of a rifle-shot "global conspiracy" claim that the Court of Appeals ruled was properly dismissed) alleged to have conspired with American insurers.

On January 13, 1992, K.F. Alder and the other British defendants filed a Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit. This Court granted certiorari on October 5, 1992.

SUMMARY OF ARGUMENT

In this global economy, increasingly transactions have effects beyond their borders. Application of every nations' law to the same transaction would create enormous inefficiencies in markets and unfairness to innocent traders who have no notice that their natural, normal and customary acts may later be considered a "wrong" on the other side of the world. To protect against such inefficiencies, unfairness and intrusion, and to legitimize extraterritorial applications of United States law where the failure to do so would leave United States competition exposed to flagrant economic wrongdoing, a limiting principle is necessary.

The case of K.F. Alder provides the opportunity for declaration of such a limiting principle: United States law does not extend to a foreign actor who acts on its home soil, with its own nationals, in pursuance of conduct regarded as a lawful, good and necessary business activity in its own country, where there is no conduct in or into the regulating nation, and which conduct has no characteristics of a wrong to the ultimate plaintiff.

Second, if subject matter jurisdiction is present under such circumstances, comity considerations require dismissal of the London reinsurance claims against K.F. Alder. Comity is a principle of reciprocity and mutual respect. Just as the United States policy and its citizens surely would wish no other nation's courts to intermeddle in the way it conducts its internal markets, the United States should reciprocally leave the Lloyd's reinsurance market to the governance of Great Britain. K.F. Alder's conduct is at the core of operations necessary to the functioning of the Lloyd's reinsurance market. Therefore comity requires dismissal of K.F. Alder.

Many other factors underscore the correctness of this result. K.F. Alder is British. It has no American corporate affiliation. K.F. Alder conducted its business solely in the Lloyd's market and not in the United States. It had no notice of a wrong to Americans.

The District Court dismissed the foreign defendants on grounds of comity largely because application of United States law in this case would conflict with the operation of the Lloyd's reinsurance market and no other factor counseled the opposite result. District courts should be encouraged to exercise just such restraint in the interests of containing meritless litigation and putting a limit on the sometimes litigious tendencies in our economy. Because the District Court evaluated each factor required to be considered by law, its determination should be respected and its exercise of restraint should be affirmed.

ARGUMENT

I.

THERE IS NO JURISDICTION OVER THE CLAIMS AGAINST K.F. ALDER

This case presents the problem of the extraterritorial application of United States antitrust law. The case of K.F. Alder represents the extreme application of federal jurisdiction. Plaintiffs seek to draw into United States courts a remote foreign defendant on the outer reaches of alleged conspiracies. No proper interest is served by forcing K.F. Alder into the machinery of American law.

The extraterritoriality debate reflects the tension between the extremes of limited jurisdiction and far-reaching extended jurisdiction. The problem of limited jurisdiction (jurisdiction cut back to American shores) is that a nation may be powerless to defend itself against economic aggressors of another nation who may wish to sharp shoot across national borders and can do so with

impunity. This problem gave rise to the *Lotus* doctrine: a nation's jurisdiction extends to such sharp-shooting acts with effects in the regulating nation's borders. *The S.S. Lotus*, 2 World Court Rep. 20 (1935). The *Lotus* doctrine has expanded into well known American law that has properly allowed United States law to reprehend worldwide strategic cartels targeted at the United States. *See, e.g., In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980) (affirming default judgment against foreign participants in Uranium cartel); *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), *modified and aff'd*, 332 U.S. 319 (1948) (enjoining international titanium cartel from exchanging and cross-licensing patents). The United States must be able to exonerate its important national interests even in a global interdependent economy.

The converse problem is that of extended jurisdiction. In a world of unlimited extraterritorial jurisdiction, nations might expansively intercede in the affairs of other nations. There are three concerns about expansive jurisdiction. First, nations are sovereign and each nation has the right to structure its own economy. Second, people, firms and citizens of a nation have a right to notice of the law that governs their actions. When a foreign actor has merely performed a customary act in his own nation with no notice of a wrong, he cannot justly be hauled into another nation's courts and thereby trigger broad discovery and the spector of treble damages which in themselves are considered gargantuan in his home nation. Third, a world in which every nation's law governed every transaction of every individual acting at home and with respect to its internal market would be unlivable as well as grossly inefficient.[18]

18. For an example of the inefficiency of imposing United States antitrust law on conduct more properly the subject of foreign regulation, *see British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd.* (II) [1955] Ch. 37 (ordering British patent assignee to perform contract (continued...)

In this context, Judge Cardozo's admonition in *Palsgraf* comes to mind: "The risk reasonably to be perceived defines the duty to be obeyed." *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 334, 162 N.E. 99, 100 (1928) (no duty of care, and hence no negligence, to plaintiff whose injury was not foreseeable). Conduct should be regulated only by laws that are understandable. A firm cannot act in accordance with the law unless the consequences of its conduct and the potential legal exposure for such consequences are definable in advance within predictable limits.

Accordingly, there comes a point at which principled lines must be drawn. The European Community has recognized this reality of the global economy in the recent *Wood Pulp* case. *See Re Wood Pulp Cartel: A Ahlstromoy v. E.C. Commission*, 1988 E.C.R. 5193, 4 C.M.L.R. 901 (1988) (case 89/85). The European Court of Justice dismissed the wood pulp cartel case against an American Webb-Pomerene Association, KEA, because, while KEA was allegedly a forum for and participant in a cartel directed at Europe, KEA did not *implement* its agreement in the Community.

K.F. Alder's argument for dismissal is similar to and much stronger than KEA's. It is similar because K.F. Alder implemented no offending conduct in or into the United States. It is much stronger because K.F. Alder's alleged "offense"—agreeing with joint underwriters as to the risks the joint venture would underwrite—cannot be regarded as a wrong to America for which

18(...continued)
notwithstanding United States decree requiring cancellation and reassignment of British patent); *see also United States v. Imperial Chem. Indus., Ltd.*, 105 F. Supp. 215 (S.D.N.Y. 1952) (cancelling British patent assignment contract because of violation of United States antitrust law); *British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd.*, [1953] Ch. 19 (enjoining British assignee from reassigning patents to American assignor).

notice can be charged. Unlike a cartel or coercive boycott, K.F. Alder's conduct is not within the purview of consensus offenses under the law of nations. *See* American Bar Association, Section of Antitrust Law, *Report of the Special Committee on International Antitrust*, Chs. 1, 2 (Sept. 1, 1991) (cartels are consensus offenses; allowance of export cartels reflects a parochial beggar-thy-neighbor policy). To the contrary, K.F. Alder's conduct was normal and natural business conduct. Great Britain invited the conduct and the collaboration was necessary for the very workings of the Lloyd's reinsurance market.

When we examine K.F. Alder's case against the two competing prongs of extraterritoriality, we find that, first, the interest of the United States in extended jurisdiction—by telling a reinsurer what risks it must cover—is nonexistent. Second, the interests of K.F. Alder in fairness and notice, and the interests of Great Britain in the efficiency and solvency of the Lloyd's firms are overwhelming.

This case suggests a principle: a regulating nation (the United States) has no subject matter jurisdiction over a foreign defendant who acts on its own soil with its own nationals in pursuance of conduct regarded as a lawful, good and necessary business activity in its own country, where there is no conduct in or into the regulating nation, and which conduct has no characteristics of a "wrong" to the ultimate plaintiff.

The wisdom of this conclusion is all the more compelling when we examine more fully the special predicament of K.F. Alder. The only specific conduct allegation against K.F. Alder is that K.F. Alder attended a single meeting at which it allegedly agreed to exclude all pollution coverage from its reinsurance treaties. JA-32 (Cal. Compl. ¶¶ 94-95); JA-84-85 (Conn. Compl. ¶¶ 98-99). This decision was a reaction to (1) judicial expansion by United States courts of coverage under existing CGL policies to shift the astronomical cost of cleaning up decades of environmental contamination from corporate polluters to insurers, notwithstanding

express policy terms intended to exclude such coverage;[19] and (2) the skyrocketing expense reinsurers were incurring as a result of such exposure, which expense had the potential to threaten the very financial stability of some individual underwriters at Lloyd's. *Cf. New Castle County v. Hartford Accid. & Indem. Co.*, 933 F.2d 1162, 1202 (3d Cir. 1991) (acknowledging "sound economic

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19. *See, e.g., Shapiro v. Public Serv. Mut. Ins. Co.*, 19 Mass. App. 684, 477 N.E.2d 146 (1985) (refusing to enforce pollution exclusion according to its terms); *Summit Assoc. v. Liberty Mut. Ins. Co.*, 229 N.J. Super. 56, 550 A.2d 1235 (App. Div. 1988) (reversing lower court opinion which held that public policy considerations override plain meaning of owned property exclusion in CGL policies); *Jackson Township Mun. Util. Auth. v. Hartford Accid. & Indem. Co.*, 186 N.J. Super. 156, 451 A.2d 990 (Law Div. 1982) (gradual, long term pollution deemed "sudden and accidental," and thus covered, as long as it was unexpected and unintended by the insured); *Niagara County v. Utica Mut. Ins. Co.*, 80 A.D.2d 415, 439 N.Y.S.2d 538 (4th Dep't 1981) (pollution exclusion will be applied only to "active" polluters notwithstanding the absence of such limitation from the terms of the exclusion); *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 426 N.Y.S.2d 603 (4th Dep't 1980) (the word "sudden" as used in the pollution exclusion will not be limited to an instantaneous happening); *Waste Management of Carolinas Inc. v. Peerless Ins. Co.*, 323 S.E.2d 726, (N.C. Ct. App. 1984) (treating pollution exclusion as restatement of occurrence definition), *rev'd*, 315 N.C. 688, 340 S.E.2d 374 (1986); *United Pub. Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 664 P.2d 1262 (1983) (pollution exclusion not applied and instead construed as simply a restatement of occurrence definition in CGL policy); *see also Centennial Ins. Co. v. Lumbermen's Mut. Casualty Co.*, 677 F. Supp. 342, 346 (E.D. Pa. 1987) (each of 16 deposits of pollutants is a separate "occurrence" allowing insured to collect additional, separate sets of policy limits); *Pacific Indem. Co. v. Bunker Hill Co.*, Civ. No. 79-2010, 1984 WL 3256 (D. Idaho July 3, 1984) (triple "trigger" applied to pollution claims finding coverage under every policy from initial dumping of pollutants through manifestation of contamination).

reasons" why the insurance industry might choose to insure some pollution losses and not others). The District Court found that there were legitimate business reasons for the underwriters at Lloyd's to agree to the terms on which they would jointly underwrite risks. A-76-77.

As plaintiffs concede, treaty reinsurance is paradigmatic of a product that is not available and cannot be made available absent collaboration among the participating underwriters. JA-11, 17 (Cal. Compl. ¶¶ 4(u), 28, 31); JA-61 (Conn. Compl. ¶ 4(g)). Agreements as to the terms of shared risks are legal, indeed contemplated, under British law. A-73; JA-263 (Restrictive Trades Practices (Services) Order 1976, S.I. 1976 No. 98, Schedule ¶ 8); § 2 Competition Act of 1980, vol. 47 Trade & Industry (PT 1).

Plaintiffs' core complaint, namely the terms upon which CGL insurance is available, can be addressed without an unwarranted application of United States law to K.F. Alder. Plaintiffs have challenged the modification of ISO forms and the withdrawal of statistical support for broader ISO CGL forms. *See generally* JA-23-33 (Cal. Compl. ¶¶ 97-100); JA-85-86 (Conn. Compl. ¶¶ 101-04). Plaintiffs have also alleged that certain defendants coerced ISO into accepting more restrictive policy forms. JA 26-29 (Cal. Compl. ¶¶ 74-83); JA-79-81 (Conn. Compl. ¶¶ 78-86). Each of these claims is independent from the London reinsurance claims. There is no justification for allowing plaintiffs to pursue K.F. Alder and other reinsurers who, without any intent to harm or effect United States commerce, simply conducted their business affairs within the bounds of British law.

If there were ~~subject matter~~ jurisdiction in this case, other characteristics relating to K.F. Alder, such as K.F. Alder's lack of a United States parent or affiliate and the fact that K.F. Alder's presence adds virtually nothing to plaintiffs' case, would be weighty in a comity analysis. But this Court need not even reach a comity analysis. As the European Community has recognized, some line

must be drawn to legitimize the exercise of extraterritorial jurisdiction when exercise is necessary to protect the important interests of a regulating nation. Application of an appropriate principle requires recognition that K.F. Alder is beyond the subject matter jurisdiction of the United States courts.

II.

INTERNATIONAL COMITY CONSTRAINS THE EXTRATERRITORIAL APPLICATION OF THE ANTITRUST LAWS OF THE UNITED STATES

A. Comity Limits The Exercise Of Jurisdiction Over Antitrust Claims Against Foreign Subjects and Conduct

Comity implies mutual respect, mutual deference and restraint and even mutual help. *See, e.g., Hilton v. Guyot*, 159 U.S. 113 (1985); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), *aff'd after remand*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985); Agreement Between the Government of the United States and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, 30 I.L.M. 1487, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504 (1992) (positive comity among nations in helping one another enforce their respective laws). Comity is thus a doctrine of reciprocity. Negative comity implies that, under certain circumstances, one sovereign state will not regulate the conduct of the nationals of a second sovereign state and that the second sovereign state will similarly respect the freedom of actions of nationals of the first.

Our world economy is becoming ever more interdependent. Increasingly, conduct in one nation transcends national boundaries. It has become important, therefore, to define those categories of

conduct by foreign firms that deserve mutual respect and restraint and those categories that do not.

At the extremes, an international consensus is emerging. The United States and its trading partners are moving to a consensus that sharp-shooting cartels and boycotts directed from one nation across the borders of another and implemented in that other nation are presumptively not worthy of the victim nation's respect and restraint. The national and world interest in competition normally trumps a second nation's interest in allowing its firms to wield market power and profit from exploiting citizens of another country. *See* American Bar Association, Section of Antitrust Law, *Report of the Special Committee on International Antitrust*, Ch. 1-3 (Sept. 1, 1991).

But at the other extreme a nation has an interest in being let alone to run an entirely internal market such as the Lloyd's reinsurance market. At this extreme, comity considerations are overpowering. The United States would not abide intrusion by foreign courts to reset the terms of its own internal markets. In return for control over its own markets and in the interest of reciprocity (if not in the interest of long-term world competition) the United States must accept the obligation to leave the Lloyd's reinsurance market alone.

K.F. Alder's conduct goes to the core of the functioning of the Lloyd's reinsurance market. That market could not exist without agreements among joint venturers as to the risks they will jointly underwrite. Comity therefore requires the dismissal of the claims against K.F. Alder.

B. *Timberlane* And Other Decisions Set Forth A Useful Framework For Analyzing When International Comity Counsels Against Extraterritorial Application Of United States Antitrust Law

Mindful of the political and economic implications of applying United States antitrust law to foreign subjects and conduct abroad, federal courts and scholars have identified several factors that may be considered in deciding whether to exercise jurisdiction. *See, e.g.*, *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir. 1979) (exercising jurisdiction "when two American litigants are contesting alleged antitrust activity abroad that results in harm to the export business of one"); *Timberlane*, 549 F.2d 597 (9th Cir. 1976), *aff'd after remand*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985) (affirming refusal to exercise antitrust jurisdiction on comity grounds); *see also* Restatement (Third) Foreign Relations Law § 403 (1987) (setting forth factors important to comity analysis).[20] Of these, *Timberlane* is considered the leading statement of "whether American authority *should* be asserted in a given case as a matter of international authority." *Timberlane*, 549 F.2d at 613 (emphasis in original).[21] The

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20. The Court of Appeals for the District of Columbia has rejected comity and interest balancing as an essentially futile and result-driven process. *See Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

21. *Timberlane* contemplated a three step analysis to evaluate whether jurisdiction should be exercised over foreign defendants engaged in clearly abusive conduct: (1) there must be an actual or intended effect on America commerce; (2) there must be a cognizable civil violation of American antitrust law; and (3) the interests of and links to the United States must be sufficiently strong vis-á-vis other nations to justify an assertion of extraterritorial authority. 549 F.2d at 613. As to the third prong, *Timberlane* requires considerations of the following (continued...)

formulations vary in their details, but each attempts to give due weight to the competing interests of sovereign governments in an international dispute. *See Mannington Mills*, 595 F.2d at 1297-98; *Timberlane*, 549 F.2d at 614; United States Dept. of Justice Antitrust Guidelines for International Operations, Antitrust of Trade Reg. (BNA) Special Supp. to No. 1391, § 5, at 5-22 (Nov. 17, 1988); Restatement (Third) Foreign Relations Law § 403.

When the United States has a stake in enforcement because foreigners' conduct has harmed its important interests, the United States should be able to enforce its law at least against foreign firms that are intentionally and seriously harming United States interests unless application of United States law would be unreasonable. When the United States' stake is not so clear, the interest of foreign nations and fairness to foreign defendants could more readily tip the balance toward abstention. If the enforcing nation's stake is very

21.(...continued)
factors:

1. the degree of conflict with foreign law or policy;
2. the nationality, location and principal places of business of the parties;
3. the extent to which enforcement by either state can achieve compliance;
4. the relative significance of effects on the United States as compared to elsewhere;
5. the existence of intent to harm or affect United States commerce;
6. the foreseeability of such effect; and
7. the relative importance to the violations charged of the conduct within the United States as compared with conduct abroad.

549 F. 2d at 614. This list is not exhaustive of all considerations potentially relevant to the comity analysis.

clear, a higher degree of foreign conflict would be necessary to warrant a decline of jurisdiction.

As to K.F. Alder, United States interests in assertion of jurisdiction is slight. The unfairness to K.F. Alder, should the District Court exercise jurisdiction, is clear and the extreme intrusiveness of United States relief against ordinary internal market transactions is also clear.

Because K.F. Alder is a foreign subject peripheral to, and many layers removed from, the primary alleged evil and its conduct was clearly not abusive, comity requires examination of the relationship of the defendant to the core allegations and consideration of whether dismissal of the defendant impairs or has little effect on important interests that United States law protects. *Cf. Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (among factors relevant to whether plaintiff is entitled to relief under antitrust law are directness or indirectness of alleged injury and whether more direct victims of challenged conduct exist).

I. The Foreign Trade Antitrust Improvements Act Of 1982 Does Not Limit A District Court's Discretion To Abstain From Exercising Jurisdiction On Comity Grounds

The Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") addressed the jurisdictional reach of federal antitrust law. It was intended to limit the application of United States law to United States companies doing business abroad. The statute eliminates federal subject matter jurisdiction regarding commerce other than import commerce unless the challenged conduct has a "direct, substantial and reasonably foreseeable effect" on domestic commerce or exports from the United States. 15 U.S.C. § 6a (Supp. 1992). *See, e.g., The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494, 499-501 (M.D.N.C. 1987) (plaintiff's injuries wholly within France did not satisfy requirement of actual injury to plaintiff

within the United States); *Liamuiga Tours v. Travel Impressions Ltd.*, 617 F. Supp. 920, 924-25 (E.D.N.Y. 1985) (St. Kitts situs of alleged effects did not support jurisdiction); *Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F. Supp. 1102, 1106-07 (S.D.N.Y. 1984) (failure to allege causal link between conduct in Europe and alleged price increase in the United States fatal to jurisdiction).

While it clarified certain limits to the extraterritorial reach of United States antitrust law, Congress stated that it intended "neither to prevent nor to encourage additional judicial recognition of the special international character of transactions." H.R. Rep. No. 97-686, 97th Cong., 2d Sess. 2, 13, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498. The FTAIA in no way affected a court's ability, indeed duty, to consider international comity in deciding whether to refrain from exercising extraterritorial jurisdiction. The House Report that accompanied the bill states, "If a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts' ability to employ notions of comity, *see, e.g., Timberlane Lumber Co. v. Bank of America*, 549 F.2d 1287 (3d Cir. 1979) [sic], or otherwise to take account of the international character of the transaction." H. R. Rep. No. 97-686, 97th Cong. 2d Sess. at 13, *reprinted in* 1982 U.S.C.C.A.N. at 2498.

The Ninth Circuit misinterpreted the FTAIA when it held that "[w]e do not believe a *Timberlane* analysis . . . can be unaffected by the statute. . . . [If the FTAIA is not a bar] it is only in an unusual case that comity will require abstention from jurisdiction." A-28. By directing courts to be self-consciously ungenerous in their comity analysis and construing the FTAIA to expand extraterritorial application of United States antitrust law, the Court of Appeals turned the FTAIA on its head.

2. The District Court's Exercise Of Restraint Was Proper And Should Be Upheld

The Circuits are split as to whether a decision to abstain from exercising jurisdiction over an extraterritorial application of United States antitrust law is to be resolved as a matter of law or is properly left to the discretion of the district court.[22] *See In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1255 (7th Cir. 1980); *Timberlane*, 595 F.2d 1297-98. *But see Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 884 (5th Cir. 1982), *cert. granted and judgment vacated*, 460 U.S. 1007 (1983).

We submit that the District Court should have a range of discretion to decline to exercise jurisdiction. The question should be discretionary when the District Court has considered all relevant

22. There is some confusion generally in the lower federal courts over the standard of review applicable to decisions to decline or to exercise jurisdiction in light of comity considerations, whether those decisions involve recognition of a foreign judgments, first to file rules or concurrent jurisdiction. *See Overseas Inns S.A. P.A. v. United States*, 911 F.2d 1146, 1148-49 n.4 (5th Cir. 1990); *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 729 n. 2 (5th Cir. 1985); *see also Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 554 (1987) (Blackmun, J., concurring and dissenting) (disagreeing with majority's view that comity requires case-by-case analysis); *cf. Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1229-30 (9th Cir. 1989) (affirming district court's discretion to dismiss case in deference to tribal proceedings); *Remington Rand Corp. v. Business Sys., Inc.*, 830 F.2d 1260, 1266 (3d Cir. 1987) (district court's decision not to extend comity to decision of foreign tribunal affirmed under abuse of discretion standard); *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95-96 (9th Cir. 1982) (dismissal in favor of earlier filed action involving same issue between same parties in another federal court was not an abuse of discretion).

factors and has not made a perceptible error in assessing the proportionate weight of the factors. The District Court acted within these parameters by dismissing the London reinsurance claims. The dismissal should have been affirmed by the Ninth Circuit unless the appellate court found that the District Court had abused its discretion.

The House Report that accompanied the FTAIA implicitly recognizes the discretionary character of comity considerations by referring to a court's "ability" to take such interests into account. H.R. Rep. No. 97-686, 97th Cong., 2d Sess. at 13, *reprinted in* 1982 U.S.C.C.A.N. at 2498. The comity analysis, requiring as it does a balancing of competing interests, "does not counsel a rigid and mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts." *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-84 (1952). Given its greater familiarity with the facts, the claims and the litigants, the District Court is in the best position to screen weak claims against foreign defendants.

When a district court dismisses antitrust claims against a peripheral foreign defendant that exercise of restraint should be upheld in view of the United States interest in containing excessive, oppressive and internationally troublesome litigation. *Cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986) (principal purpose of summary judgment rules is to dispose of meritless claims).

III.

UNDER *TIMBERLANE* THE DISTRICT COURT PROPERLY DECLINED TO EXERCISE JURISDICTION OVER THE CLAIMS AGAINST K.F. ALDER

In reversing the dismissal on comity grounds, the Ninth Circuit failed to consider the special case of K.F. Alder and others similarly situated. The District Court properly dismissed the claims against K.F. Alder.

K.F. Alder is an unincorporated association of individuals with its principal place of business at Lloyd's in London, England. JA-11, 13 (Cal. Compl. ¶¶ 4(t), 12); JA-61, 68 (Conn. Compl. ¶¶ 4(h), 25). With respect to the type of coverage relevant to this case, K.F. Alder is a British reinsurer providing insurance to Lloyd's reinsurers. Its business is regulated by Great Britain and it acted according to British practice and custom. K.F. Alder is not alleged to have written CGL insurance for United States pollution risks. K.F. Alder is not affiliated with any United States company. K.F. Alder committed no acts in the United States in furtherance of any conspiracy. All that K.F. Alder is alleged to have done is a legitimate and necessary business act under the laws of its principal place of business: attending a meeting at which co-venturers allegedly agreed to the risks they would underwrite.

Reviewing the claims against K.F. Alder within the comity framework, the Court of Appeals should have affirmed their dismissal.

A. Degree Of Conflict With Foreign Law Or Policy

The District Court found, and the Court of Appeals agreed, that extraterritorial application of United States antitrust law to these claims would offend British law and policy in two respects: First, the London reinsurance insurance business is conducted within "a regulatory and competitive framework established by the British

government." (A-72. *See also* A-29). Second, "the evidence of conflict between the antitrust laws and English law and policy is substantial." A-74. *See also* A-29. The United Kingdom's position before this Court confirms this conclusion. *See* Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners, dated February 12, 1992, at 9.

Any attempt to impose United States antitrust law on the Lloyd's reinsurance marketplace in a way that impairs normal business transactions would conflict with the "regulatory and competitive framework established by the British government" within which Lloyd's operates. A-72. Further, British law permits precisely the type of agreements among reinsurers and retrocessional reinsurers that plaintiffs would invalidate. *See* A-73; JA-263 (Restrictive Trade Practices (Services) Order 1976, S.I. 1976 No. 98, Schedule ¶ 8); § 2 Competition Act of 1980, vol. 47 Trade & Industry (PT 1). Moreover, Great Britain has legislatively sought to obstruct any application of United States antitrust law to subjects or conduct within its borders. A-74. *See* A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act*, 75 A.J.I.L. 257 (1981). To that effect, the British Parliament enacted the Protection of Trading Interests Act, effective March 20, 1980. *See id.*; Comment, *Antitrust: British Restrictions on Enforcement of Foreign Judgments*, 21 Harv. Int'l L.J. 727 (1980). Under the Act, the British Secretary of State can "block" the enforcement of foreign court judgments that prejudice British interests. *See also Société Nationale*, 482 U.S. at 527 (French blocking statute enacted to impede enforcement of United States antitrust law).

Both courts below held that in the absence of countervailing factors, these conflicts alone justify abstention.

B. The Nationality Or Allegiance Of The Parties And The Locations Of The Principal Places Of Business Of Corporations

K.F. Alder is an unincorporated association of individuals with its principal place of business at Lloyd's in London, England. JA-11, 13 (Cal. Compl. ¶¶ 4(t), 12); JA-61, 68 (Conn. Compl. ¶¶ 4 (h), 25). It is a wholly British entity. It is not a subsidiary of any United States corporation. Nor is it otherwise affiliated with any United States corporation. While the District Court correctly noted that "many of the corporate defendants are subsidiaries of American parents," A-75, this is not the case as to K.F. Alder and the District Court did not find to the contrary.

Whether or not the Court of Appeals correctly observed that "[t]he interests of Britain are at least diminished where the parties are subsidiaries of American corporations," A-29, this observation does nothing to justify the exercise of jurisdiction over K.F. Alder.[23]

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23. The Court stated:

> The defendants named in certain counts are English or located in England. The district court found that "many of the corporate defendants," including those located in England, "are subsidiaries of American corporations and may be influenced by the allegiance of their American parents." . . . Moreover, although some counts of the complaints have named only the English reinsurers as defendants, other counts charge them as co-conspirators with American insurers. . . . It would not make much sense to dismiss the London defendants on some counts and hold them answerable on others. On balance, the presence of the American plaintiffs, many American defendants and some American subsidiaries is a factor pointing towards the exercise of jurisdiction.

(continued...)

In reversing the dismissal of the claims against K.F. Alder and others, the Court of Appeals relied on the fact that *some* of the London defendants are alleged to have co-conspired with American insurers. The Ninth Circuit believed "[i]t would not make much sense to dismiss the London defendants on some counts and hold them answerable on others." A-29-30. This reasoning does not apply to K.F. Alder. If the London reinsurance claims against K.F. Alder are dismissed, K.F. Alder is out of the case.[24]

The District Court found that adjudication of this dispute would require the testimony of witnesses and the production of documents located in England. A-75. On balance, the court ruled that nationality or allegiance of the parties and their principal places of business weighed against an exercise of jurisdiction. A-75. As to K.F. Alder, this factor weighs heavier still.

C. The Extent To Which Plaintiffs Can Expect To Get Meaningful Relief Against K.F. Alder

Plaintiffs seek an injunction barring K.F. Alder from making any public announcements regarding product restrictions, pricing behavior or loss reserve charges. JA-52 (Cal. Compl. ¶ 167). Plaintiffs further seek an order requiring K.F. Alder to withdraw any terms or conditions of coverage established in the ordinary course of business. JA-54 (Cal. Compl. ¶ 174). Indeed, no court could compel K.F. Alder to provide pollution reinsurance because United States antitrust law does not impose a duty to deal absent a showing

23.(...continued)
A-29-30.

24. If no federal claims against K.F. Alder survive a motion to dismiss, at this point in the proceeding the district court could not exercise pendent jurisdiction over the state law claims against K.F. Alder. *See United Mine Workers of America v. Gibbs*, 388 U.S. 715 (1966).

of market power. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery Printing Co.*, 472 U.S. 284 (1985); *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

But, as the District Court observed, even if an injunction were entered against K.F. Alder, it is "improbable" that a British court would enforce the requested injunction against activities in London. A-76. The injunction against K.F. Alder would be neither enforceable nor enforced. *See* British Protection of Trading Interests Act (1980). The District Court concluded that this factor tipped against the exercise of jurisdiction. A-76-77.

The Court of Appeals, in contrast, emphasized that compliance could be achieved as to the defendants with American affiliations. A-30. However, as previously noted, K.F. Alder is a British defendant *without* American affiliations and the Ninth Circuit's observation is wholly inapplicable.

The Court of Appeals believed that enforcement of an injunction against American companies and British companies affiliated with American companies would result in "substantial compliance." *Id.* This observation supports the dismissal of the claims against K.F. Alder. The relative importance to plaintiffs' claims of having K.F. Alder before the District Court is minimal, if not non-existent.

D. The Relative Significance Of The Effects On The United States As Compared With Those Elsewhere

The District Court concluded, and the Court of Appeals agreed, that the challenged conduct affected commerce in the United States. A-30, 76. Again, it spoke of conduct in the aggregate including claims that some defendants coercively refused to deal with Americans to get better terms. Given the nature of how coverage is underwritten in the Lloyd's reinsurance market, K.F. Alder surely could not have provided reinsurance for primary insurers of American risks alone.

The District Court found that there were legitimate business reasons for the joint decision to exclude certain coverage. A-76-77. The legitimate business justification driving the agreement was that it was uneconomical to cover pollution risks. United States antitrust law cannot compel joint venturers to provide what business solvency counsels them not to provide. With or without an agreement, the uneconomic coverage would not have been provided.[25] A decision of British service providers not to extend the terms of their coverage does not "cause an effect" in the United States; surely it does not do so in the sense that a coercive boycott or price cartel causes an effect. *Cf. Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir. 1981) (party alleging inability to purchase as result of antitrust law violation lacks standing if alleged injury is tenuous or fact of injury is speculative), *cert. denied*, 455 U.S. 1001 (1982); *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981) (extraterritorial jurisdiction under Sherman Act requires injury to United States commerce which reflects anticompetitive effects of violation outside of United States). Accordingly, K.F. Alder's alleged conduct did not affect United States commerce in a manner that tips the balance in favor of the exercise of jurisdiction.

E. The Extent To Which There Is An Explicit Purpose To Harm Or Affect United States Commerce

The District Court found that the challenged conduct "was directed primarily at reducing [defendants'] exposure to certain risks and controlling losses, a legitimate business purpose." A-76. The District Court believed this factor weighed against the exercise of

25. In this context, the tort law concepts of nonfeasance and malfeasance are applicable. K.F. Alder and its co-defendants are alleged to have done nothing more than decline to confer a benefit that they cannot in any event be compelled to provide. But if there is no duty owed, one cannot be instructed as to how the duty must be performed.

jurisdiction. It clearly does. Indeed, this finding itself makes intrusion by United States law inappropriate and unreasonable.

The District Court's finding also bears on whether there is a cognizable civil violation of United States antitrust law. *See Timberlane*, 549 F.2d at 613. Under a rule of reason analysis, the legitimate business justification for K.F. Alder's actions undermines any basis for liability.[26] The weakness of the underlying claims against K.F. Alder further supports jurisdictional restraint.

F. Foreseeability Of Such Effect

The District Court found that the effect on commerce in the United States was foreseeable. A-77. Again, this factor was determined in the aggregate. However, K.F. Alder could not foresee that sending a representative to a risk discussion meeting in London would have an effect on United States commerce sufficient to form a predicate for a claim under United States antitrust law. The legitimacy of its acts in the Lloyd's reinsurance marketplace is particularly compelling as to K.F. Alder, for it acted solely in the Lloyd's reinsurance marketplace and it had every legitimate expectation that only the law of Great Britain would apply to its conduct. Because "[t]he risk reasonably to be perceived defines the duty to be obeyed," *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 344, 162 N.E. 99 (1928), exposure under United States antitrust law was not a foreseeable consequence of K.F. Alder's natural, normal and customary business act.

26. *Timberlane* requires the District Court to make a rough evaluation of the merits of the underlying claim when considering whether there is a cognizable antitrust claim. 549 F.2d at 613.

G. The Relative Importance To The Violation Charged Of Conduct Within The United States As Compared With Conduct Abroad

The District Court ruled that, on balance, this factor was neutral in light of the interplay between the alleged activities in the United States and the alleged foreign agreements. A-77. But K.F. Alder engaged in *no* relevant conduct in the United States. The claims against K.F. Alder are based entirely on conduct outside of the United States. As to K.F. Alder, this factor properly weighs heavily against the exercise of jurisdiction. The Court of Appeals did not address this issue.

* * *

After thoughtfully analyzing the London reinsurance claims in light of comity considerations, the District Court exercised appropriate restraint and dismissed the claims. On appeal, the Ninth Circuit was obliged to consider whether the exercise of jurisdiction was appropriate as to each individual defendant. This Court may do so, and upon doing so should, we submit, conclude that the factors require dismissal of K.F. Alder.

While many extraterritorial problems will present difficult questions, K.F. Alder's case does not. K.F. Alder's alleged conduct is clearly beyond the permissible jurisdictional reach of a United States court.

CONCLUSION

For all the foregoing reasons, petitioner K.F. Alder respectfully requests that as to K.F. Alder the judgment of the Court of Appeals for the Ninth Circuit on the London reinsurance claims be reversed and the judgment of the District Court for the Northern District of California be reinstated.

Dated: New York, New York
November 19, 1992

Respectfully submitted,

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A 1

Nos. 91-1111 and 91-1128

In the Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., ET AL.,
AND
MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, ET AL.,
PETITIONERS

v.

STATE OF CALIFORNIA, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONERS IN NO. 91-1111

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104pp

QUESTIONS PRESENTED

1. Whether domestic insurance companies whose conduct otherwise would be exempt from the federal antitrust laws under the McCarran-Ferguson Act lose that exemption because they participate with foreign reinsurers in the business of insurance.

2. Whether agreements among primary insurers and reinsurers on standardized advisory insurance policy forms and terms of insurance coverage constitute a "boycott" outside the exemption of the McCarran-Ferguson Act.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

This antitrust action originally was brought by the States of Alabama, Arizona, California, Massachusetts, Minnesota, New York, West Virginia, and Wisconsin. The litigation subsequently was joined by the States of Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Montana, New Jersey, Ohio, Pennsylvania, and Washington, and by a number of private plaintiffs, 14 of which appealed from the district court's adverse decision and thus were parties in the court of appeals (Ace Check Cashing, Inc.; Acme Corrugated Box Co.; Anastasios Markos T/A Municipal Exxon; Bay Harbor Park Homeowner's Association; Bensalem Township Authority; Big D Building Supply Corp.; Carlisle Day Care Center, Inc.; Durawood, Inc.; Environmental Aviation Sciences, Inc.; Jerry Grant Chemical Associates, Inc.; Keyboard Communications, Inc.; Carmella M. "Boots" Liberto T/A R.J. Liberto, Inc.; P & J Casting Corp.; and Henry J. Rosenfeld).

The 32 defendants are: (1) four primary insurance companies: The Aetna Casualty and Surety Company; Allstate Insurance Co.; Hartford Fire Insurance Co.; and Insurance Company of North America and its corporate parent, CIGNA Corp.; (2) Insurance Services Office, Inc. ("ISO"), a licensed property-casualty rating and advisory organization whose participants include some 1400 insurance companies in the United States; (3) six domestic reinsurance companies: Constitution Reinsurance Corporation; General Reinsurance Corporation; Mercantile & General Reinsurance Company of America; North American Reinsurance Corporation; Prudential Reinsurance Company; and Winterthur Reinsurance Corp. of America; (4) the Reinsurance Association of America ("RAA"), an association of domestic reinsurers; (5) 17 foreign reinsurers, including two individuals: Merrett Underwriting Agency Management Limited; Three

Quays Underwriting Management Limited; Janson Greene Management Limited; Edwards & Payne (Underwriting Agencies) Limited; C.J.W. (Underwriting Agencies) Limited; Murray Lawrence & Partners; Oxford Syndicate Management Limited; D.P. Mann Underwriting Agency Limited; J. Brian Hose and Others, Ltd.; Unionamerica Insurance Co. Ltd.; CNA Re (U.K.) Ltd.; Terra Nova Insurance Co., Ltd.; Excess Insurance Company Limited; Kemper Re (U.K.) Ltd.; Continental Reinsurance Co. (U.K.) Ltd.; Robin A.G. Jackson; and Peter N. Miller; and (6) one domestic and two foreign reinsurance brokers: Thomas A. Greene & Co., Inc.; Ballantyne, McKean & Sullivan, Ltd.; and R.K. Carvill & Co., Ltd.

Petitioners in No. 91-1111 are the above domestic primary insurance entities and their licensed rating organization, and the domestic reinsurance entities (including Thomas A. Greene & Co., the domestic reinsurance broker) and their trade association. Parent companies and subsidiaries (other than wholly owned subsidiaries) of petitioners are listed at Pet. App. 100a and, for Winterthur Reinsurance Corp. of America, at page iii of the petition for a writ of certiorari in No. 91-1131.*

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* The sole change in petitioners' Rule 29.1 statement since the filing of the petitions is as follows:

> Hartford Fire Insurance Company is a wholly owned subsidiary of ITT Hartford Group, Inc., which is a wholly owned subsidiary of ITT Corporation. Hartford Fire Insurance Company's subsidiaries that are not wholly owned are ADAPT, Inc., and Thoroughbred International Insurance Company.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 938 F.2d 919. The opinion of the district court (Pet. App. 33a-88a) is reported at 723 F. Supp. 464.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1991. Timely petitions for rehearing were denied on October 15, 1991. Pet. App. 89a-97a. The petition for a writ of certiorari in No. 91-1111 was filed on January 10, 1992, and was granted on October 5, 1992. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATEMENT

A. The United States Insurance Industry

Review of the allegations of plaintiffs' complaints requires an understanding of the basic features of the business of insurance in the United States. Accordingly, before describing the particular facts of this case, we briefly summarize the overall structure and relevant characteristics of this industry.

1. *Primary Insurance, Reinsurance, And Standardized Insurance Forms*

Defendants in this case include domestic primary insurance companies and domestic reinsurers (petitioners herein) and foreign reinsurers (petitioners in Nos. 91-1128 and 91-1146). A primary insurer sells insurance directly to policyholders (Cal. Cmplt. ¶ 4(j); Conn. Cmplt. ¶ 4(*o*)) and defines the risks it undertakes through the terms of the insurance policy.[1] Reinsurers provide

[1] The state complaints, which are tracked by the complaints of the private plaintiffs, fall into two groups typified by the pleadings of the attorneys general of California and Connecticut. Pet. App. 12a-13a. The California and Connecticut complaints are set out at J.A. 5-56 and J.A. 57-102.

"insurance for insurers" by contracting to indemnify a primary company for a portion of the risks it has insured. Cal. Cmplt. ¶ 4(o); Conn. Cmplt. ¶ 4(p). Primary insurers and reinsurers are uniquely "intertwined and interdependent." States' Unified Dist. Ct. Br. 7. A reinsurer shares the primary insurer's risks, and the liabilities of both reinsurer and primary insurer depend upon the terms of the primary policy. 1 B. Webb, H. Anderson, J. Cookman, & P. Kensicki, PRINCIPLES OF REINSURANCE 87 (1990).

Distribution of risks through reinsurance is an integral part of the business of insurance. See Pet. App. 46a-47a. Reinsurance promotes the solvency of insurance companies, and so protects policyholders, by permitting insurers to spread their risk to guard against catastrophic losses. In addition, primary insurers do not have to maintain financial reserves for the portion of the risk they cede to reinsurers and thus can increase their capacity to write additional policies in order to compete in the sale of insurance. Cal. Cmplt. ¶ 34; Conn. Cmplt. ¶ 4(p).

To meet the reinsurance needs of domestic primary insurers, much reinsurance must be placed abroad. The general liability risks at issue in this case are reinsured in large part through Lloyd's of London and the London Company Market. Cal. Cmplt. ¶¶ 4(t, v), 30-31; Conn. Cmplt. ¶¶ 4(h, i), 40; Pet. App. 8a-9a, 35a-37a.

The ability of primary insurers to obtain reinsurance is facilitated by standardization of the policy forms upon which primary insurance is written. Primary insurers often share their risks with many reinsurers because of the limited capacity of individual reinsurers and the need to diversify sources of coverage. Without standardized forms, every reinsurer would have to review the terms of each primary policy before committing to reinsure, causing intolerable delays and increased costs. See R. Keeton & A. Widiss, INSURANCE LAW 119 (1988) ("risk distribution on the scale that exists in a complex commercial society may only be feasible if insurance transactions employ standardized insurance policy terms").

Form standardization also enables the insurance industry to compile accurate data about risks and costs, which are used in state-supervised ratemaking proceedings to set premium rates that safeguard insurer solvency and provide reasonable prices for consumers. K. Abraham, INSURANCE LAW & REGULATION 31 (1990). Moreover, standardization protects consumers and their agents and brokers from facing an unintelligible array of insurance forms with coverage provisions that could not be compared, thus facilitating comparison-shopping for insurance on the basis of such factors as price, quality of service, and insurer reliability. *Id.* at 28, 29.

2. *General Liability Insurance; Occurrence And Claims-Made Coverages; And The Tort Liability Crisis*

General liability insurance indemnifies business and governmental entities against third-party claims for bodily injury or property damage. Most general liability insurance is written on standardized Commercial General Liability ("CGL") advisory policy forms developed by defendant Insurance Services Office, Inc. ("ISO"). ISO, whose participants include some 1400 domestic property and casualty insurers, is licensed or registered in all 50 states as a rating, rate service, or advisory organization. ISO develops standardized advisory forms that comply with state requirements for general liability and other types of insurance and files these forms with state insurance departments. Cal. Cmplt. ¶¶ 4(k), 38-39, 41, 44; Conn. Cmplt. ¶¶ 4(e), 47-50; Pet. App. 9a, 36a; Banfield Aff. ¶ 2.[2]

General liability insurance traditionally was written on "occurrence" policy forms. Simply put, an occurrence policy provides coverage for injuries or damage occurring

[2] In support of their motion for summary judgment, defendants submitted the uncontested affidavit of Carole Banfield, ISO's Senior Vice President of Government Relations, which describes the states' review of the forms at issue in this case. That affidavit and relevant excerpts from the exhibits are set out at J.A. 113-185.

while the policy is in force, regardless of when a claim is made. Occurrence policies thus have a "long tail"; claims for harms with an extended latency period, such as some pollution claims, may be submitted many years after the policy has expired. These long-tail risks often are unforeseeable when the occurrence policy is written and hence are not reflected in the underwriting decision or the premium charged. Moreover, unanticipated judicial interpretations of the scope of occurrence coverage may expand the risks insured long after a policy has expired. Cal. Cmplt. ¶ 4(a, b, h); Conn. Cmplt. ¶ 4(b, m); Banfield Aff. ¶ 6. "Claims-made" policies, by contrast, generally provide coverage for claims made during the policy period (or any extension of the claims-reporting period), even if the event giving rise to the claim occurred earlier. Even before 1984, claims-made policies were in common use for lines of insurance such as medical malpractice and other long-tail coverage. Cal. Cmplt. ¶ 4(c); Conn. Cmplt. ¶ 4(a); Banfield Aff. ¶ 6.

The activities of defendants challenged in this case followed developments in the tort liability system that adversely affected much of the casualty insurance industry in the early to mid-1980s. At that time, changing legal standards had expanded tort liability and created uncertainty about future tort liability costs. Banfield Aff. Exhs., J.A. 133, 142; U.S. Dep't of Justice, Tort Policy Working Group, *An Update on the Liability Crisis* 53 (Mar. 1987) ("*1987 DOJ Report*"); U.S. Dep't of Justice, *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* 2-3 (Feb. 1986) ("*1986 DOJ Report*"). In addition, both the number of tort claims filed and the amount of damages awarded had substantially increased. General liability insurance premiums did not reflect these unpredictable extensions of tort liability. *1986 DOJ Report* at 3.

Much of the cost of escalating tort liability was imposed on insurers through expansive and unforeseeable judicial

interpretations of insurance coverage. Banfield Aff. Exhs., J.A. 133, 142-143; *1986 DOJ Report* at 51. For example, general liability policies traditionally covered claims for damage caused by "sudden and accidental" pollution. Some courts interpreted this provision to include gradual pollution incidents that insurers had intended to exclude. Banfield Aff. Exh., J.A. 171-172; *1986 DOJ Report* at 55. See, *e.g.*, *American Motorists Ins. Co.* v. *General Host Corp.*, 667 F. Supp. 1423, 1427-1430 (D. Kan. 1987) (criticizing conflicting cases).

These developments contributed to substantial underwriting losses for casualty insurers. To avoid further losses, insurers increased premiums for new general liability insurance to levels that reflected the actual risks assumed and declined to write certain coverages that threatened exposure to continued underwriting losses. *1986 DOJ Report* at 1-3, 14, 49, 55. Several federal government agencies investigated allegations that joint action by insurance companies, rather than the tort liability crisis and other economic factors, had caused the unavailability and unaffordability of insurance coverage during the 1980s. These agencies uniformly concluded that such claims had no merit.[3]

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[3] See *To Repeal or Revise the McCarran-Ferguson Act: Hearings Before the Senate Committee on the Judiciary*, 100th Cong., 1st Sess. 53-54 (1987) (statement of Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, Department of Justice) ("it seems highly probable that the property/casualty industry is in fact competitive, and that collusion is not responsible for the availability and affordability crisis in certain lines of insurance"); Letter from Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division, to Jay Angoff, National Insurance Consumer Organization (Apr. 22, 1986) ("The Federal Trade Commission has within the last six months investigated similar charges concerning the pricing and availability of certain lines of property and casualty insurance. * * * I understand that the Commission has now closed the investigation because it was unable to find any evidence of collusion"); U.S. Dep't of Justice, Antitrust Division, "The Crisis in Property-Casualty Insurance," Appendix to *1987 DOJ Report* ("It has been asserted that a principal cause of the crisis has been concerted, anticompetitive actions by insurers to raise prices in certain lines

B. The Complaints In This Case

1. *Development Of The 1986 Forms And The States' Review*

In 1977, ISO began to review its 1973 CGL form, which was an occurrence form that covered "sudden and accidental" pollution and other general liability risks. Cal. Cmplt. ¶¶ 4(*l*), 52-53, 55; Conn. Cmplt. ¶¶ 4(*l*), 56-57, 59. In 1984, ISO proposed two new advisory forms —one an occurrence form and the other, as an alternative, a claims-made form. Cal. Cmplt. ¶ 56; Conn. Cmplt. ¶ 60; Pet. App. 36a-38a. Each proposed form maintained coverage for "sudden and accidental" pollution. Each form also provided that the insurer would continue to bear the legal costs of defending covered claims against the insured in addition to the stated limits of coverage. Finally, the proposed claims-made form covered claims made during the policy period for injury arising out of any prior occurrence; it did not contain a "retroactive date" provision excluding coverage of claims stemming from events occurring before the agreed date. Cal. Cmplt. ¶¶ 4(e-g), 53-54, 59-60; Conn. Cmplt. ¶¶ 4(c, n, q), 57-58, 63-64.

ISO submitted the proposed 1984 forms and four subsequent sets of revisions to the insurance departments in all 50 states. Thirty-five states and the National Association of Insurance Commissioners ("NAIC") held public hearings on the forms and received the views of all interested parties, including primary insurers, domestic and foreign reinsurers, insureds, the general public, and consumer advocates. State attorneys general also submitted their views as to the impact of the forms on competition and consumer welfare. In addition, state insurance departments held continuing discussions with ISO, raised numerous questions concerning the rationale for and consequences of the proposed forms, and requested additional

of property-casualty insurance or even to refuse to write such insurance. Economic analysis of the relevant insurance markets, however, leads to the conclusion that such a scenario is implausible").

information. Finally, the forms were widely discussed in the media and in open meetings within the insurance industry. Before the final revisions in 1986, the proposed ISO forms were rejected by a number of states. Pet. App. 37a-38a; Banfield Aff. ¶¶ 7, 9, 11-13, 16, & Exh. H; Defendants' State-by-State Appendix (¶ 4 of each state summary).[4]

As revised in response to the states' review and discussions within the industry, the final 1986 forms differed from the 1973 form in three respects relevant here: (1) the revised forms provided alternative occurrence and claims-made coverage options; (2) the forms excluded pollution-related losses but provided similar coverage through an optional "buy-back" endorsement as well as two separate specialized advisory policy forms for pollution risks; and (3) the claims-made form provided for a retroactive date includable by agreement between the insurer and the insured. Another change from the 1973 form which was considered but not adopted, would have made the legal costs of defending a claim subject to the dollar limits of the policy. Banfield Aff. ¶¶ 10, 14-16, 21. As ultimately amended, both the occurrence and claims-made forms were approved by 42 states, including 16 of the 21 states relevant to this litigation.[5]

[4] The summary-judgment record contains defendants' State-by-State Appendix summarizing the states' insurance regulatory systems and forms-review processes. Excerpts from this appendix are set out at J.A. 186-215.

[5] Plaintiffs California and Colorado had no procedure for approving proposed forms, but had authority to disapprove forms and took no action to disapprove the CGL forms. Pet. App. 38a. Only plaintiffs Massachusetts and New Jersey declined to approve either of the 1986 CGL forms; in those states the 1973 form continued to be used, supplemented by state-approved endorsements that included limitations on pollution coverage identical to those in the 1986 forms. (Massachusetts in 1989 and New Jersey in 1990 approved the 1986 occurrence form.) Four other states—plaintiff New York, and Nebraska, Texas, and Vermont—disapproved the 1986 claims-made form but approved the 1986 occurrence form. *Ibid.*; Banfield Aff. ¶¶ 17, 19-20.

In reviewing ISO's revisions, state insurance regulators focused on precisely the same issues that underlie plaintiffs' claims here: the appropriate triggering event for coverage, the retroactive date provision, the separation of pollution coverage from the basic forms, and the inclusion of defense costs within policy limits. Banfield Aff. ¶¶ 8-11. In approving the proposed forms, state insurance commissioners determined that they were in the public interest. For instance, the Connecticut Insurance Commissioner concluded that "the insurance industry has fairly demonstrated a need for a Claims Made form of insurance, specifically in long tail types of commercial coverage." Banfield Aff. Exh., J.A. 139. Similarly, the Illinois Insurance Commissioner concluded that "[t]his new policy form filing presents a new approach at a time when the market place is in desperate need of a tool to break the intolerable boom and bust cycle which has dominated liability markets for decades." *Id.*, J.A. 154. A number of state insurance commissioners specifically discussed the role of reinsurers during the development of the revised forms and the reinsurers' concerns about existing forms. *E.g.*, Banfield Aff. ¶ 16; Exhs., J.A. 133-134, 165, 174, 175, 177-178.

More than a year after the approved 1986 forms became effective, ISO discontinued its data-collection and risk-estimation support services for the superseded 1973 CGL form (except in the two states where neither of the new forms had been approved). Cal. Cmplt. ¶ 99; Conn. Cmplt. ¶¶ 102-103; Pet. App. 38a.

2. *Plaintiffs' Boycott Allegations*

Notwithstanding the conclusion of the federal government that the insurance crisis in the 1980s was not attributable to collusion among insurers (see page 5 & note 3, *supra*), the attorneys general of 19 states filed the present complaints in 1988 and 1989 alleging violations of Section 1 of the Sherman Act. These complaints asserted that defendant primary insurers and reinsurers engaged in conduct that amounted to acts of

"boycott, coercion, or intimidation" outside the McCarran-Ferguson Act's antitrust immunity for the business of insurance.

Specifically, plaintiffs charged that defendant primary insurers opposed features of ISO's 1984 proposed advisory forms and sought, by enlisting the assistance of defen~~dant domes~~tic and foreign reinsurers, to have ISO eliminate occurrence coverage, pollution coverage, and retroactive coverage, and to include defense costs within coverage limits. The primary insurers and reinsurers were alleged to have stated that if general liability insurance were written on the proposed 1984 forms, defendant reinsurers would not reinsure it. As a result, ISO allegedly agreed with defendant primary insurers and reinsurers to withdraw the proposed 1984 forms, and to file in their place advisory forms that did not include retroactive or pollution coverage and to modify its forms further at some unspecified time in the future to include defense costs within policy limits. ISO also discontinued statistical support for the superseded 1973 form. Cal. Cmplt. ¶¶ 51-85, 97-100, 111-125, 129; Conn. Cmplt. ¶¶ 73-89, 101-104, 120-124.

In addition, plaintiffs charged that defendant foreign reinsurers (petitioners in Nos. 91-1128 and 91-1146) attempted to eliminate use of the occurrence policy and of the pollution coverage endorsement that were available under the 1986 CGL forms. To accomplish this objective, these foreign reinsurers allegedly agreed not to reinsure policies written by domestic primary insurers on the 1986 occurrence policy form or on forms without a pollution exclusion. Cal. Cmplt. ¶¶ 87-96, 106-110, 131-140, 146-150; Conn. Cmplt. ¶¶ 91-100, 110-114, 125-139.[6]

[6] As relief, plaintiffs sought to restructure the general liability insurance business. Cal. Cmplt. ¶¶ 157-186; Conn. Cmplt. ¶¶ 147-163. Notwithstanding state insurance departments' approval of the revised forms, plaintiffs requested that ISO be enjoined to re-issue the originally-~~proposed~~-1984 forms amended by new provisions added by plaintiffs. Cal. Cmplt. ¶ 163. Furthermore, plaintiffs asked for stringent limits on communications between and among insurers

C. The Decisions Of The Courts Below

Accepting plaintiffs' factual allegations as true and taking all disputed facts and inferences in plaintiffs' favor (Pet. App. 35a), the district court dismissed the complaints. Judge Schwarzer held that the alleged activities of the defendants, including the foreign reinsurers, were entitled to McCarran immunity because they constituted the "business of insurance * * * regulated by State Law." *Id.* at 46a-50a. In the alternative, the court concluded that, even if the foreign reinsurers' activities were not subject to state regulation and hence not exempt from the federal antitrust laws, the domestic insurers and reinsurers would not lose their exemption as a result of their alleged "joint action with nonexempt entities." *Id.* at 47a n.13.

The district court further held that the complaints failed to allege a boycott within the exception to antitrust immunity under the McCarran-Ferguson Act. Pet. App. 50a-58a. The court determined that, "[s]tripped of their pejorative allegations" (*id.* at 43a), plaintiffs' complaints "charge no more than an agreement to restrict coverage." *Id.* at 52a. Because "the McCarran Act leaves unprotected [only] conduct which goes beyond the making and implementation of agreements to do business only on terms acceptable to the participant * * *, such as refusals to deal on any terms and exclusion from alternative sources" (*id.* at 57a), defendants' alleged "agreements relating to the terms on which the participants were willing to write insurance and reinsurance" (*id.* at 55a) did not constitute a boycott.

In reaching this conclusion, Judge Schwarzer noted that plaintiffs' complaints "represent their best effort" to make out a McCarran boycott. Pet. App. 84a. Before filing

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and reinsurers (*id.* ¶¶ 159, 170-177) and urged major revisions in ISO's operation and governance, including prohibiting defendants "from participating on any board or committee of ISO for five years" (*id.* ¶ 166) and requiring ISO's Board of Directors to consist of a majority of "public-interest members as appointed by the Court." *Id.* ¶ 168; see also Conn. Cmplt. ¶ 154.

their complaints, plaintiffs had engaged in a two-year inquiry "with all the investigatory powers available to sovereign governments" (*ibid.*), and plaintiffs themselves have acknowledged that their complaints were based on "the most extensive multi-State antitrust investigation ever conducted." *Hearings on S. 1299 Before the Subcomm. on Antitrust of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 15 (1988) (statement of New York Attorney General Robert Abrams). The district court also afforded plaintiffs the opportunity to conduct any discovery relevant to defendants' pretrial motions. Pet. App. 58a, 83a-84a. Despite this, as Judge Schwarzer held, plaintiffs were unable to allege any facts raising a triable issue as to boycott. *Id.* at 57a.

The Ninth Circuit reversed. Pet. App. 1a-32a. It did not dispute that the district court had "accepted all the facts alleged by the plaintiffs" (*id.* at 14a) and had viewed "plaintiffs' allegations * * * as true." *Id.* at 17a. In addition, it agreed with the district court that all the challenged conduct involved the "business of insurance" (*id.* at 18a) and that the domestic primary insurance and domestic reinsurance entities "are subject to regulation by the states." *Id.* at 20a. Nevertheless, the court of appeals overturned the district court's legal conclusion that the McCarran Act required dismissal of the complaints.

First, the court of appeals held that the domestic insurer and reinsurer defendants "lost" their McCarran immunity "when they conspired with the foreign defendants" because the foreign reinsurers were not regulated by the states. Pet. App. 20a. According to the court, the controlling rule of law under the McCarran Act is that "[m]embership of an exempt entity in a conspiracy with nonexempt entities makes the exempt entity liable." *Ibid.* Thus—even though petitioners, as regulated domestic insurance entities, were "prima facie immune" under the Act (*ibid.*), and even though foreign reinsurers were part of the "business of insurance" (*id.* at 18a)—petitioners

forfeited their antitrust exemption by allegedly engaging in collective insurance activities with foreign reinsurers.

Second, the court of appeals held that plaintiffs had alleged a "boycott" within the exception to McCarran's antitrust immunity. The defendant primary insurers allegedly had "enlisted the reinsurers to * * * use[] their economic power, their refusal to reinsure, to force ISO and its recalcitrant members to accept the terms Hartford and its allies wanted." Pet. App. 22a, 24a. In the court's view, this alleged conduct amounted to "much more" than the protected activity of "confer[ring] and agree[ing] on the terms on which insurance would be offered." *Id.* at 21a.

SUMMARY OF ARGUMENT

I. The court of appeals held that the domestic insurance defendants (petitioners herein) forfeited their otherwise applicable immunity under the McCarran Act because they participated in the state-regulated business of insurance with "nonexempt" foreign reinsurers. Pet. App. 20a. Contrary to the Ninth Circuit's focus on each entity's regulated status, the plain language of the Act provides immunity for the "business of insurance * * * regulated by State Law." 15 U.S.C. § 1012(b). As this Court has recognized, the statute "refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance.'" *SEC* v. *National Sec., Inc.*, 393 U.S. 453, 459 (1969) (emphasis added by Court).

The legislative history of the Act demonstrates that Congress understood the critical and customary role of foreign reinsurers in the business of insurance in the United States and clearly intended that domestic insurers and foreign reinsurers would be able to engage in joint activities exempt from antitrust challenge. The decision below frustrates the congressional scheme by denying immunity whenever, as commonly and necessarily occurs, domestic insurance entities engage in discussions and agreements with foreign reinsurers on terms and conditions of insurance.

The Solicitor General and leading commentators agree that the Ninth Circuit's forfeiture ruling is plainly wrong. If allowed to stand, it would eviscerate McCarran immunity and threaten essential and economically beneficial practices that have long been followed by insurance companies and accepted by state regulators.

II. The district court correctly held that plaintiffs' allegations failed to state a claim under the "boycott" exception to McCarran immunity. As Judge Schwarzer explained, the McCarran Act permits insurers and reinsurers to discuss and agree upon the terms and conditions on which they will engage in the business of insurance. Only conduct that is more broadly anti-competitive than such agreements—such as absolute refusals to deal, or discriminatory activities designed to exclude competitors or customers from the market—can constitute a boycott that falls outside the Act's safe harbor.

This rule finds compelling support in the precedents of this Court and the legislative history of the McCarran Act. In *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 (1978), the Court recognized that such agreements do not constitute a McCarran Act boycott; rather, a boycott requires conduct that restricts competition in ways that go beyond terms and conditions of insurance, such as the alleged elimination in *Barry* itself of *all* competition through a collective refusal by all participants in the market to deal on any terms. Congress similarly understood that agreements among insurers and reinsurers on terms of insurance are at the heart of the state-regulated business of insurance and therefore are broadly protected from the federal antitrust laws; a boycott, by contrast, excludes competitors from doing business even on the agreed-upon terms and thus forecloses competition in respects other than insurance terms, such as service. The type of anti-competitive conduct embraced by the boycott exception is illustrated by *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which provided the context for the McCarran Act and involved a classic cartel that excluded competitors from the market

through a complete refusal to deal and coercive enforcement mechanisms.

Under this rule, as the district court concluded, plaintiffs' allegations of a boycott are insufficient as a matter of law. Stripped of their pejorative characterizations and legal conclusions, plaintiffs' complaints simply allege that defendant primary insurers and reinsurers (1) met, debated, and collectively agreed upon the terms of insurance they would offer and (2) then acted in accordance with their agreements. Despite their extensive pre-complaint investigation and the opportunity to take discovery in the district court, plaintiffs have made no allegation of fact that does not reduce to an agreement on terms and conditions of insurance. Significantly, because plaintiffs do not allege that defendant reinsurers were unwilling to do business on the same terms with both non-defendant primary insurers (the alleged targets of the boycott) and co-defendant primary insurers, there is no contention in this case that defendants engaged in a refusal to deal on any terms and no contention that the alleged targets were excluded from the market or discriminated against.

The court of appeals sought to avoid the controlling rule of law by asserting that defendants were "charged with much more" than conferring and agreeing on terms of insurance. Pet. App. 21a. In no instance cited by the court, however, did the alleged action involve anything but the making or implementation of protected agreements. Instead of analyzing plaintiffs' allegations of *fact*, the court erroneously accepted their derogatory rhetoric and conclusory legal labels. As a result, the court of appeals has improperly allowed plaintiffs to use the federal antitrust laws to circumvent the state system of insurance regulation in an effort to impose insurance terms and practices different from those the state regulators have approved.

ARGUMENT

I. DOMESTIC INSURERS AND REINSURERS DO NOT FORFEIT THEIR McCARRAN-FERGUSON IMMUNITY BY PARTICIPATING WITH FOREIGN REINSURERS IN THE BUSINESS OF INSURANCE

In an unprecedented ruling with devastating impact on the insurance industry, the court of appeals held that the domestic insurance defendants, even though otherwise entitled to antitrust immunity under the McCarran-Ferguson Act, automatically lost that immunity when they allegedly engaged in joint activity with foreign reinsurers to establish terms and conditions of insurance. In a single paragraph devoid of analysis, the court of appeals invented a new rule of law under the McCarran Act that "[m]embership of an exempt entity in a conspiracy with nonexempt entities" forfeits the exempt entity's antitrust immunity. Pet. App. 20a.

The United States agrees with us that the Ninth Circuit's forfeiture ruling is plainly wrong. As the Solicitor General advised this Court in the government's brief as *amicus curiae* at the petition stage, "contrary to the court of appeals' conclusion, the mere fact that an 'exempt entity' (*i.e.*, a domestic insurance company) acts in concert with a 'nonexempt entit[y]' such as a foreign reinsurer does not automatically cause the exempt entity to 'forfeit[] [its] antitrust exemption.'" U.S. Pet. Br. 8. The language and legislative history of the McCarran Act unmistakably confirm this fundamental error in the decision below.

A. The Court Of Appeals' Forfeiture Ruling Is Inconsistent With The Plain Language Of The McCarran Act

"[T]he starting point in a case involving construction of the McCarran-Ferguson Act * * * is the language of the statute itself." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 (1979). The McCarran Act provides an exemption from the federal antitrust laws for

"the business of insurance to the extent that such business is * * * regulated by State Law." 15 U.S.C. § 1012(b). That language is straightforward and unambiguous. As this Court stated in *SEC* v. *National Sec., Inc.*, 393 U.S. 453, 459 (1969), the Act's "language refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance'" (emphasis added by Court). See J. von Kalinowski, *Ninth Circuit Reinstates Massive Insurance Antitrust Litigation Involving Reinsurance*, ANTITRUST REPORT 1, 5 (Aug. 1991) ("[T]he correct analysis does not focus narrowly on the players. The proper question to decide is whether the exempt entities are still engaged in the business of insurance. The relevant players are but one part of this determination").

1. *Business of Insurance.* There is no dispute that reinsurance falls squarely within the "ordinary understanding" of the phrase "business of insurance." *Royal Drug*, 440 U.S. at 211. The Ninth Circuit so held (Pet. App. 18a), the United States concurs (U.S. Pet. Br. 8 n.6), and the plaintiffs have not argued to the contrary either in the court of appeals or in this Court. Reinsurance—"insurance for insurers" (Cal. Cmplt. ¶ 4(*o*))—has all the elements of risk underwriting and risk spreading that have been identified by this Court as characteristic of the business of insurance. *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982). Moreover, reinsurance plays a central role in the insurance business: primary insurers depend upon reinsurance to spread their risk of catastrophic loss (Cal. Cmplt. ¶ 34), and agreements between primary insurers and reinsurers on terms of primary insurance facilitate the placement of reinsurance. See page 2, *supra*.

Furthermore, agreements with foreign reinsurers are as much an integral part of the business of insurance in the United States as agreements with domestic reinsurers. Because "[t]here is not enough capital or capacity in any one country," reinsurance "is, of necessity, a highly international business." Thompson, *Critical Issues of the Eighties: How Trends in Reinsurance Will Affect Legal, Legislative, and Regulatory Actions*, 16 FORUM 1038, 1045 (1981). In 1988, fully 38% of United States insurance risks, totaling $8.4 billion, were ceded to foreign reinsurers. General Accounting Office, *Insurance Regulation: State Reinsurance Oversight Increased, but Problems Remain* 10, 41 (1990). As plaintiffs recognize, foreign reinsurers, particularly those in London and Europe, provide a substantial portion of reinsurance for domestic general liability risks. Cal. Cmplt. ¶ 30.

2. *State Regulation.* The second requirement for McCarran immunity—that the activity that is the "business of insurance" be "regulated by State Law"—equally is satisfied here. The alleged agreements among domestic insurers and domestic and foreign reinsurers affect the terms and conditions of primary insurance offered in this country, which indisputably are subject to the plenary regulatory authority of the states. States thus can review and limit or disapprove any term of any insurance form that they determine to be the product of anti-competitive practices or otherwise not in the public interest. That unquestioned authority—which the states exercised in this case (see page 7, *supra*)—is sufficient to satisfy the state-regulation element of the McCarran Act.[7]

[7] McCarran-Ferguson immunity for the business of insurance does not turn on a federal court's assessment of the adequacy or effectiveness of the state regulation. See, *e.g.*, *FTC* v. *National Casualty Co.*, 357 U.S. 560, 564 (1958); *Ohio AFL-CIO* v. *Insurance Rating Bd.*, 451 F.2d 1178, 1184 (6th Cir. 1971); Brief for the United States as Amicus Curiae at 26-27 n.15, *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979) (No. 77-952) ("state regulation of the business [of insurance] need not be affirmative or effective to supplant the federal antitrust laws [under the McCarran Act]"); Brief for the United States as Amicus Curiae at 27 n.37, *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119 (1982) (No. 81-389) ("[t]he requirement that a state must regulate the particular conduct at issue in order to bring it within the [McCarran Act] exemption does not require the courts to determine whether the state's regulatory power is effectively exercised").

Beyond that, the states enjoy even broader regulatory power over the activities plaintiffs challenge here. The very premise of plaintiffs' complaints is that alleged agreements between domestic primary insurers and domestic and foreign reinsurers have market effects in the United States. In this circumstance, as the district court pointed out (Pet. App. 49a & n.17), state insurance departments have wide authority under state insurance and unfair practices laws to regulate not only standardized policy forms but also unfair insurance practices by primary insurers or reinsurers that restrain competition within the state. See *National Sec.*, 393 U.S. at 459-460; *FTC* v. *National Casualty Co.*, 357 U.S. 560, 564-565 (1958) (state regulation is sufficient under McCarran if a state "has enacted prohibitory legislation which proscribes unfair insurance [practices] and authorizes enforcement through a scheme of administrative supervision"); Defendants' State-by-State Appendix (¶¶ 1 & 2 of each state summary). Indeed, plaintiffs have recognized as much by including in their complaints state unfair insurance practices claims against both the domestic and foreign defendants. See Cal. Cmplt. ¶¶ 153-154.

Because McCarran immunity depends upon "the activity at issue" rather than the nature of the entities involved (U.S. Pet. Br. 8), both the domestic defendants and the foreign reinsurer defendants were entitled to immunity in this case. The court of appeals simply ignored the statutory language when it focused on the regulated status of defendants rather than on the regulated insurance business in which they engaged.[8]

[8] While we believe that the activities of *all* of the defendants, foreign and domestic, are entitled to McCarran immunity, the Ninth Circuit's forfeiture ruling is particularly indefensible as applied to domestic insurance entities. The court of appeals did not dispute that the domestic defendants were engaged in the business of insurance and that their activities were regulated by the states. Accordingly, they fall squarely within the McCarran exemption.

B. The Court Of Appeals' Forfeiture Ruling Is Irreconcilable With The History And Policies Of The McCarran Act And Would Nullify The Statutory Exemption

The Ninth Circuit's construction of the McCarran Act not only disregards the words of the statute but also frustrates Congress's manifest purpose to protect state regulation of insurance from federal interference. 15 U.S.C. §§ 1011, 1012. In formulating the McCarran antitrust exemption, Congress recognized that reinsurance is a vital part of the business of insurance, that insurers and reinsurers must agree on the terms of primary insurance, and that foreign reinsurers play a critical role in the United States insurance market. Against that legislative background, the court of appeals' interpretation would nullify the McCarran Act by removing the immunity whenever, as routinely and necessarily occurs, foreign reinsurers participate in the business of insurance.

Congress explicitly recognized that reinsurance is "a very essential phase of the [insurance] business." 90 Cong. Rec. 6528 (1944) (statement of Rep. Miller).[9] Representative Hancock, for example, noted that "effective reinsurance is necessary if the companies are to serve the public." Senate Comm. on the Judiciary, *Committee Print on S. 1362—Insurance* (pt. 1), 78th Cong., 1st Sess. 5 (1943) (*"Committee Print"*). Congress also realized that reinsurance requires advance agreement between insurer and reinsurer over the terms of primary insurance. See, *e.g.*, *ibid.* (without "advance agreement" as to "forms of coverage and rates," every "reinsurance transaction would involve negotiations between the insurer and all of its reinsurers, with resulting delay and expense which would make impossible the expeditious insurance

[9] The origins of the McCarran Act were explored in detail in *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 547 n.20 (1978); *id.* at 559-564 (Stewart & Rehnquist, JJ., dissenting). In interpreting the Act, this Court has relied upon legislative history relating to each of the bills proposed in the course of the statute's evolution. See, *e.g.*, *Royal Drug*, 440 U.S. at 217-224.

of large risks"); 90 Cong. Rec. 6527 (1944) (statement of Rep. Miller) (if "companies are not going to be permitted to get together and agree on rates, forms, and the establishment of rating bureaus * * * [h]ow could there be reinsurance?"; without "uniform rates and forms, how could such reinsurance be placed?"). Congress understood that

> [u]niformity, and knowledge in advance of what rates and policies will be, is desirable for the public, and is necessary in the functioning of insurance companies and organizations. *This is particularly true in the case of reinsurance * * *. No company could safely agree in advance to reinsure, unless it knew what the terms of its obligation would be* and the consideration therefor. Lack of agreement in advance would therefore be detrimental to public service by insuring companies.

H.R. Rep. No. 873, 78th Cong., 1st Sess. 9 (1943) (emphasis added).

In addition, Congress recognized that foreign insurers played a major role in the reinsurance of United States risks. For instance, Senator O'Mahoney noted that many reinsurance companies had their headquarters in Europe and that "[t]here is a close association * * * between the American insurance companies and the British insurance companies * * *[.] They sit down together and make rules and regulations, forms, and rates." *Joint Hearing Before Subcomms. of the Committees on the Judiciary on S. 1362, et al.*, 78th Cong., 1st Sess. 265, 269 (1943) ("*Joint Hearing*"). See also *id.* at 521 (testimony of Prof. Heuber), 502 (testimony of Oswald Ryan).

The court of appeals' forfeiture ruling thus strips immunity from agreements between primary insurers and reinsurers that Congress recognized as prevalent and necessary within the industry. Indeed, according to plaintiffs, the Ninth Circuit's forfeiture holding means that "common" agreements between primary insurers and reinsurers about the rates the primaries will charge—which

the legislative history unmistakably shows to be within the McCarran exemption—are subject to antitrust attack. N.Y. State Bar Ass'n, ANTITRUST LAW SEC. SYMPOSIUM 108-109 (Jan. 28, 1992) (address by George Sampson, N.Y. Chief of Antitrust Enforcement). Furthermore, this is, in plaintiffs' view, only "one example" of a "quite typical" way in which established industry practices violate the antitrust laws. *Ibid.* To accept plaintiffs' interpretation would "frustrat[e] * * * [t]he congressional purpose" and "lead to bizarre results." *United States* v. *Brown*, 333 U.S. 18, 26 (1948).

Nor is the court of appeals' forfeiture ruling confined to agreements with foreign reinsurers. By the court's reasoning, a domestic insurance company would lose its McCarran exemption if it discussed and agreed upon terms and conditions of insurance with any of a host of other so-called "non-exempt" entities—including consumer groups, corporate risk managers, and policyholder representatives—whose activities are not regulated directly by the state. The decision below thus jeopardizes the heretofore unexceptionable and beneficial efforts of ISO and insurance companies to take account of the views of consumers and other interested parties in conducting the business of insurance.

The court of appeals' forfeiture ruling also upsets the McCarran Act's federalism policies by interfering with state laws that expressly authorize insurers to act together with "non-exempt" entities. A number of states, including several that are plaintiffs in this action, provide that insurance companies may "act in concert with each other *and with others*," including representatives of policyholders, in developing insurance forms and rates. See Defendants' State-by-State Appendix, J.A. 187, 191, 201, 214, 215 (emphasis added). The decision below frustrates this state-authorized process of cooperation.

For these reasons, the Ninth Circuit's ruling, if permitted to stand, would wreak havoc within the insurance

industry—a fact that plaintiffs do little to disguise.[10] To retain McCarran immunity in the face of the decision below, insurers would have to abandon well-established, economically essential, and state-sanctioned participation by foreign reinsurers in forms development and other areas vital to the supply of reinsurance. The court of appeals simply "lost sight" of the language and purposes of the McCarran Act and thereby "contravened the statutory exemption." Note, *McCarran-Ferguson Immunity*, 105 HARV. L. REV. 1414, 1417, 1418 (1992). This Court should reject a construction of the Act that would bring about such a "radical reworking of [the] law." *Osborne* v. *Ohio*, 495 U.S. 103, 119 (1990).

C. The Justifications For The Forfeiture Ruling Advanced By The Court Of Appeals And Plaintiffs Are Without Merit

Neither the court of appeals nor plaintiffs have offered any plausible justification for the forfeiture ruling. The Ninth Circuit principally rested its forfeiture holding on a snippet quoted out of context from *Royal Drug* (Pet. App. 20a) to the effect that "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." 440 U.S. at 231. The issue in *Royal Drug*, however, was whether a primary insurer's agreements with pharmacies that were "wholly outside the insurance industry" (*ibid.*) constituted "the business of insurance" —an element of the McCarran exemption that the court below conceded was satisfied here. Pet. App. 18a. Furthermore, as this Court subsequently explained in *Pireno* —a case that the court of appeals completely ignored—

[10] See, *e.g.*, Kriz, *Insurers in Their Sights*, 1988 NAT'L J. 2595, 2598 (quoting former Massachusetts Attorney General James M. Shannon's statement that the purpose of this suit is to " 'restructure the [insurance] industry' "). Indeed, plaintiffs have recognized that the forfeiture ruling extends well beyond the boycott exception: " '[T]he shield is down on everything the companies did. All their activities, not just boycotting, have become available for antitrust screening.' " Weber, *Reversal of Fortune*, INS. REV., Sept. 1991, at 7, 8, quoting California Deputy Attorney General Thomas Greene.

"the involvement of [non-insurance] parties * * * [is] not dispositive" of McCarran immunity but merely constitutes "part of the inquiry." 458 U.S. at 133. In fact, *Pireno* explicitly held that challenged activities are "*not [to] be denied the [McCarran] exemption solely because they involve parties outside the insurance industry.*" *Ibid.* (emphasis added). Thus, to the extent that *Royal Drug* and *Pireno* are relevant here, they flatly contradict the Ninth Circuit's forfeiture ruling.

For their part, plaintiffs rely (Br. in Opp. 13 & n.14) on cases interpreting antitrust immunities outside the McCarran context, such as the Capper-Volstead Act immunity for "[p]ersons engaged in the production of agricultural products" (7 U.S.C. § 291) and the Clayton Act exemption for "labor * * * organizations" and their "individual members." 15 U.S.C. § 17. As this quoted language indicates, those statutory schemes define immunity by reference to a specified person or entity. The McCarran Act, by contrast, "refers not to the persons or companies" entitled to antitrust immunity, but to the state-regulated "*business* of insurance." *National Sec.*, 393 U.S. at 459.

Plaintiffs also resort (Br. in Opp. 13) to the maxim of statutory construction that exemptions from the antitrust laws should be "narrowly construed." However, canons of construction cannot defeat the clearly expressed intention of Congress. See, *e.g.*, *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992); *United States* v. *Monsanto*, 491 U.S. 600, 611 (1989). Furthermore, because the dominant purpose of the McCarran Act is to provide immunity from the federal antitrust laws for the business of insurance, it is the exceptions to the immunity, not the immunity itself, that should be narrowly applied. See, *e.g.*, *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989) (exceptions to a general statute are to be "read * * * narrowly in order to preserve the primary operation of the provision"); *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989).

As the Solicitor General has explained (see U.S. Pet. Br. 7-9), none of the asserted justifications for the court of appeals' forfeiture ruling can withstand analysis. The judgment of the court of appeals on the forfeiture issue should be reversed.[11]

II. PLAINTIFFS' ALLEGATIONS, WHICH SHOW ONLY THE FORMATION AND IMPLEMENTATION OF AGREEMENTS AMONG INSURERS AND REINSURERS ON TERMS AND CONDITIONS OF INSURANCE, DO NOT ESTABLISH A "BOYCOTT" OUTSIDE THE ANTITRUST EXEMPTION OF THE McCARRAN-FERGUSON ACT

The McCarran Act's antitrust exemption for the state-regulated business of insurance is inapplicable to acts of "boycott, coercion, or intimidation." 15 U.S.C. § 1013(b). The second question presented in this case is whether the facts alleged in plaintiffs' complaints establish a "boycott" outside the McCarran exemption.

As described in detail below (see pages 37-41, *infra*), plaintiffs' lengthy complaints may be distilled to the following allegations. First, they allege that defendant primary insurers "enlisted" defendant reinsurers in an effort to cause ISO to change its 1984 proposed advisory forms. Plaintiffs then allege that, based on meetings and discussions among the defendant primary insurers and reinsurers, the reinsurers stated that they would not reinsure certain of the risks covered by the proposed forms, thereby "coercing" ISO into amending the forms. In addition, it is alleged that after the states approved the revised ISO forms in 1986, defendant foreign reinsurers (petitioners in Nos. 91-1128 and 91-1146) agreed to decline to issue reinsurance for coverages included in some of the forms. Finally, once the 1986 forms had

[11] Because plaintiffs alleged no boycott in count seven of the California complaint or count six of the Connecticut complaint (see Pet. App. 25a, 41a-42a), the Ninth Circuit's judgment as to those counts rests entirely on the forfeiture ruling and thus cannot survive reversal of that holding.

been approved, ISO discontinued its statistical support services for the superseded 1973 form. All of this, plaintiffs contend, amounted to a boycott by inhibiting the ability of non-defendant primary insurers (the alleged targets of the boycott) to provide insurance that offered different coverage terms.

On this record, the district court correctly rejected plaintiffs' boycott claim. Relying on this Court's decision in *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 (1978), the court recognized that "[t]he purpose of McCarran Act immunity is to permit joint action by insurers and underwriters within the states' regulatory schemes to formulate policy terms and determine coverage." Pet. App. 56a. In distinguishing between such "lawful joint action" and a "prohibited boycott" (*id.* at 53a), Judge Schwarzer explained that "[w]hat the McCarran Act leaves unprotected is conduct which goes beyond the making and implementation of agreements to do business only on terms acceptable to the participant * * *, such as refusals to deal on any terms and exclusion from alternative sources." *Id.* at 57a. Nor do permissible agreements become impermissible boycotts simply because they are implemented in practice or have economic consequences in the marketplace; to hold otherwise "would effectually nullify the McCarran Act." *Ibid.*

Applying that standard, the district court concluded that plaintiffs failed to allege facts that, if proved, would constitute a McCarran boycott. As Judge Schwarzer observed, "plaintiffs here charge no more than an agreement to restrict coverage" (Pet. App. 52a) by collectively determining "the terms on which the participants were willing to write insurance and reinsurance." *Id.* at 55a. Beyond this alleged agreement, "[t]here is no charge and no evidence that any defendants conspired to refuse to do business with any person or firm to achieve their objectives, or that by other improper means they enforced their collective decisions against others." *Ibid.* Thus, plaintiffs' boycott "allegations are limited to collective

refusals to do business except upon terms acceptable to defendants" and do "not even * * * suggest[] that any underwriter or reinsurer (or anyone else) was prevented from having free and unimpaired access to any market." *Id.* at 56a. Because plaintiffs' "[c]onclusory allegations" (*id.* at 57a) of a boycott could not cure the legal defect in their theory, and because plaintiffs could not allege "facts which raise a triable issue as to boycott" despite their "lengthy [pre-complaint] investigations" and "the opportunity * * * to conduct relevant discovery" (*id.* at 57a-58a), the court held that the boycott exception to McCarran immunity was inapplicable.

In reversing the district court's ruling, the court of appeals gave lip service to the "incontestable" principle that McCarran immunity protects agreements "on the terms on which insurance would be offered." Pet. App. 21a. But the Ninth Circuit's decision drains that principle of all practical significance. In purporting to find "much more" (*ibid.*) here than an agreement, the court of appeals improperly accorded decisive effect not to any *facts* asserted in the complaints but to plaintiffs' pejorative characterizations and conclusory allegations of a boycott. Plaintiffs' factual allegations show nothing more than the formation and implementation of agreements among insurers and reinsurers over the coverage they were willing to provide.

The court of appeals' boycott ruling cannot be reconciled with the decisions of this Court or the intention of Congress. As this Court recognized in *Barry*, an agreement on terms and conditions of insurance is protected joint activity and does not give rise to a boycott. McCarran's legislative history confirms that Congress intended a broad safe harbor for such agreements and that the boycott exception was intended to reach the type of absolute exclusionary conduct represented by *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). To correct the Ninth Circuit's misunderstanding of the controlling boycott standard, this Court should make clear that the agreements alleged in this case are

at the core of the statute's protection and, as a matter of law, do not constitute a "boycott."

A. An Agreement On Terms And Conditions Of Insurance Is Not A Boycott

Although the McCarran Act refers to "boycott," it nowhere defines that term. However, if one point emerges with clarity from this Court's decision in *Barry*, the legislative history of the Act, and the seminal case of *South-Eastern Underwriters*, it is that an agreement among insurance entities on coverage or rates of insurance is protected joint activity rather than a boycott. As the Solicitor General acknowledges, "an agreement among insurers 'on the terms on which insurance would be offered,' without more, is not a McCarran-Ferguson boycott." U.S. Pet. Br. 13.

1. *This Court's Decision In* Barry *Establishes That An Agreement On Terms And Conditions Of Insurance Is Protected Joint Activity And Not An Unprotected Boycott*

Barry involved an alleged conspiracy among the only four insurance companies that wrote medical malpractice insurance in Rhode Island. St. Paul, the largest of the insurers, declined to renew malpractice coverage that had been issued on an occurrence basis and announced that it would write only claims-made policies. The other three companies, acting in furtherance of the conspiracy, then "refused to accept applications for any type of insurance" from medical providers insured by St. Paul. The object of the conspiracy was "to restrict St. Paul's policyholders to 'claims made' coverage by compelling them to 'purchase medical malpractice insurance from one insurer only, to wit * * * St. Paul.'" 438 U.S. at 535. On this record, the Court held that a boycott under the McCarran Act was adequately pleaded by the allegations of a collective refusal by the three insurance companies to do any business with policyholders of St. Paul.

Although the Court "assumed * * * that Congress intended [McCarran's boycott] language to be read in light

of" the "body of decisions interpreting the Sherman Act" (438 U.S. at 541), it acknowledged that those "decisions reflect a marked lack of uniformity in defining the term" and indeed that " 'boycotts are not a unitary phenomenon.' " *Id.* at 543. Furthermore, the Court recognized that "words or phrases in a statute come 'freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion. In such conditions history is a teacher that is not to be ignored.' " *Id.* at 545-546. Accordingly, the Court concluded that "[w]e * * * must consider whether Congress intended to attach a special meaning to the word 'boycott' in [the McCarran Act]." *Id.* at 546.

This Court recognized that an agreement among insurers on terms and conditions of insurance, even if it could be characterized as a boycott under the Sherman Act, is not a McCarran boycott. As the Court explained, not "all concerted activity violative of the Sherman Act comes within" the boycott exception. 438 U.S. at 555. That acknowledgment addressed the concern of the dissenting Justices that an expansive reading of "boycott," affording it "the same scope it has in Sherman Act case law, * * * would plainly devour the broad antitrust immunity bestowed by" the McCarran Act. *Id.* at 559 (Stewart & Rehnquist, JJ., dissenting). As the dissent explained (*id.* at 559 n.6):

> Most practices condemned by the Sherman Act can be cast as an act or agreement of "boycott, coercion, or intimidation." For example, price fixing can be seen either as a refusal to deal except at a uniform price (*i.e.*, a boycott), or as an agreement to force buyers to accept an offer on the sellers' common terms (*i.e.*, coercion). Yet state-sanctioned price fixing immunized by § 2(b) [of the McCarran Act] was plainly not intended to fall within the § 3(b) exception [for boycotts, coercion, or intimidation].

In response, the majority stressed that the term "boycott" in the McCarran Act is not "coextensive with the prohibitions of the Sherman Act" and in particular that

joint insurance agreements setting rates or terms, "*in the absence of any additional enforcement activity,* [*are not to be*] *treated* * * * *as 'a boycott.'* " *Id.* at 545 n.18 (emphasis added).

Notwithstanding this analysis, the Court in *Barry* concluded that the alleged conduct of the defendant insurance companies came within the boycott exception. Like the court of appeals in *Barry* (see 438 U.S. at 540) and both the plaintiffs[12] and the United States as *amicus curiae* in support of plaintiffs in that case,[13] this Court emphasized that the case did not involve an alleged agreement on terms or rates of insurance. Instead, the co-conspirators absolutely refused to deal on *any* terms with St. Paul's existing policyholders in order to eliminate all alternative sources of supply and thus compel those policyholders to obtain insurance only from St. Paul. See, *e.g.*, *id.* at 544 ("St. Paul induced its competitors to refuse to deal *on any terms* with its customers"), 552 ("The four insurance companies that control the market in medical malpractice insurance are alleged to have agreed that three of the four would not deal *on any terms* with the policyholders of the fourth. * * * St. Paul obtained the agreement of the other * * * [defendants] to refuse to sell *any* insurance to its policyholders"), 553 ("[t]he agreement binding [defendants] erected a barrier between St. Paul's customers and *any* alternative source of the desired coverage"), 554 n.26 (referring to the "concerted refusal to deal *on any terms* with St. Paul's policyholders") (emphases added).

The defendants' absolute refusal to deal in *Barry* was a boycott because, by eliminating competition on matters other than terms and conditions of insurance, it was

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[12] See Respondents' Br. 43 ("The complaint in this case alleges that three of petitioners engaged in a concerted refusal to sell respondent physicians *any* malpractice insurance on *any* terms. That is a traditional boycott—*i.e.*, a complete refusal to deal").

[13] See U.S. Am. Br. 23 ("The charge was not just a refusal to deal except on certain terms, but a refusal to deal at all. Such a blanket refusal to deal is a classic example of a boycott").

much more broadly anti-competitive than an agreement on terms would have been. As the Court explained, the co-conspirators' "refus[al] to deal on any terms with [St. Paul's] customers * * * did *not simply fix rates or terms of coverage; it effectively barred St. Paul's policyholders from all access to alternative sources of coverage.*" 438 U.S. at 544 (emphasis added). By thus "effectively foreclosing all possibility of competition anywhere in the relevant market," the defendants' "concerted refusal to deal went *well beyond a private agreement to fix rates and terms of coverage, as it denied policyholders the benefits of competition in vital matters such as claims policy and quality of service.*" *Id.* at 553 (emphasis added). A McCarran boycott accordingly existed because the co-conspirators' complete refusal to do business with St. Paul's policyholders eliminated all competition among the insurance companies.

> "[E]ven where prices are rigidly fixed, the members of a cartel will be able to compete with each other with respect to product quality unless a homogeneous product is involved. Indeed, even if the product is homogeneous there will be room for *rivalry in such matters as promptness in filling orders and the provision of ancillary services.* An effective division of markets, by contrast, might *substantially wash out all opportunity for rivalry.*"

Id. at 553 n.25 (quoting L. Sullivan, HANDBOOK OF THE LAW OF ANTITRUST 224-225 (1977)) (emphasis added).

It was in the setting of this careful analysis that the Court observed, in a passage heavily relied upon by the Ninth Circuit (Pet. App. 22a) and plaintiffs (Br. in Opp. 10), that "[t]he enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott." 438 U.S. at 544-545. Taken in context, however, this reference cannot be read to suggest that a boycott claim under the McCarran Act is made out by allegations of joint agreements to offer insurance and reinsurance only on

prescribed terms and conditions; that reading would be squarely inconsistent with the Court's recognition that such agreements are not boycotts. Rather, the Court's opinion clearly indicates that the concept of an "agreement not to trade" refers to an *absolute* refusal to deal that eliminates competition on matters beyond terms and conditions of insurance. Thus, the above-quoted sentence was immediately preceded by the Court's statement that the defendants "did not simply fix rates or terms of coverage" but rather "refuse[d] to deal on any terms with [St. Paul's] customers." *Id.* at 544. Likewise, in later summarizing its ruling, the Court reiterated that the alleged boycott involved a total refusal to deal on any terms (*id.* at 552):

> The conduct in question accords with the common understanding of a boycott. The four insurance companies that control the market in medical malpractice insurance are alleged to have agreed that three of the four would not deal on any terms with the policyholders of the fourth. As a means of ensuring policyholder submission to new, restrictive ground rules of coverage, St. Paul obtained the agreement of the other petitioners, strangers to the immediate dispute, to refuse to sell any insurance to its policyholders.

The opinion therefore makes clear that the "common understanding of a boycott" on which the finding of a boycott was predicated cannot be divorced from the alleged refusal to "deal on any terms" or "to sell any insurance."

Barry establishes a framework of analysis that is directly applicable to the present case: an agreement among insurers on terms and conditions of insurance does *not* constitute a boycott within the meaning of the McCarran Act. This principle protects insurance activity that is at the heart of the Act and is necessary to effectuate the congressional scheme. Only when an agreement is accompanied by other anti-competitive conduct—such as an absolute refusal to deal on any terms, or discriminatory activity that excludes competitors or customers from the

market—does an alleged antitrust violation fall outside the protection of the statutory safe harbor.[14]

2. *The Legislative History Of The McCarran Act And The SEUA Case Demonstrate That Congress Created Broad Antitrust Immunity For Agreements On Terms And Conditions Of Insurance*

a. *The legislative history.* The legislative history of the McCarran Act shows a congressional purpose to provide broad and comprehensive immunity for agreements on terms of insurance. The Act was a response to the Sherman Act prosecution in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) ("*SEUA*"), which held for the first time that insurance was subject to Congress's power under the Commerce Clause.

The McCarran Act reflected Congress's concern that application of the competitive policies of the Sherman Act would lead to "chaos in the insurance business" by prohibiting the "cooperation and accord" between insurers that "is required for best protecting the public interest." H.R. Rep. No. 873, at 6. The long experience of the states in regulating insurance had demonstrated that "the method of doing business which is required by the anti-trust laws is not the method which is best suited to the special nature of the insurance business." 89 Cong. Rec.

[14] Lest our argument be misapprehended, we do not intend—and we do not believe that this Court intended—that a refusal to deal on any terms be an invariable or talismanic element of a boycott. Instead, it is a probative factor that is indicative of conduct that is more drastically restrictive of competition than a joint agreement on terms and conditions of insurance. Thus, for example, if co-conspirators "offered" to deal with boycott targets but only on terms that were unfairly discriminatory, that might fall outside the safe harbor for agreements even though the anti-competitive conduct nominally involved an "offer" to deal rather than a formal refusal to deal at all. But where (as here, see pages 38-39, *infra*) the defendants are willing to do business on the *same terms* with alleged boycott targets and co-defendants alike, no boycott exists.

10661 (1943) (statement of Rep. Miller). On the contrary, it was well understood that insurance "is unique" and "is something quite different from the ordinary commercial transaction"; "if the business of insurance is to be conducted to meet the needs and requirements of all businesses and all persons," "[u]niformity, as to rates, forms of policies and the like * * * is necessary" and "promotes competition rather than restrains it." H.R. Rep. No. 873, at 7, 8, 9. See also *id.* at 10; 90 Cong. Rec. 6535 (1944) (statement of Rep. Gwynne).[15]

Congress understood that a wide range of agreements among insurers on terms and conditions of insurance was essential to achieving the necessary uniformity and was an integral element of the business of insurance. To permit such cooperative arrangements notwithstanding the prohibitions of the Sherman Act, Congress enacted general antitrust immunity for joint agreements on the terms and conditions on which insurance would be offered. See, *e.g.*, H.R. Rep. No. 873, at 7 ("insurance * * * requires cooperation and accord forbidden by Federal anti-trust laws"); *Committee Print* at 5 (statement of Rep. Hancock) ("the public interest in insurance lies in encouraging cooperative action, and of necessity it tends to uniformity and the maintenance of uniformity in rates and forms of coverage"); 90 Cong. Rec. 6536 (1944) (statement of Rep. Howell) ("[t]he states * * * long ago determined that methods of cooperation and joint action were preferable for this * * * unique type of busi-

[15] In particular, Congress recognized that uniformity promotes insurer solvency, facilitates the placement of reinsurance, and furthers accuracy and reliability in industry data compilation and actuarial projections. See, *e.g.*, H.R. Rep. No. 873, at 9 ("agreement in advance" on "policies" is "necessary" for the placement of reinsurance); 91 Cong. Rec. 1481 (1945) (statement of Sen. Ferguson) (uniformity serves to keep insurers "sound and solvent"); 90 Cong. Rec. 6526 (1944) (statement of Rep. Walter) ("uniformity in * * * forms of coverage" promotes "the solvency of the insurer" and "accurate determination * * * of relative hazards and averages").

ness," and "[u]niformity as to rates, forms of policies, terms, and conditions * * * is only possible as a result of joint action and cooperation"). Such agreements and all activities "necessary and incidental" thereto were thus exempted from the reach of the Sherman Act. S. Rep. No. 1112 (pt. 2), 78th Cong., 2d Sess. 6 (1944) (minority views) (recommendations of the NAIC, whose views "are particularly significant * * * because the Act ultimately passed was based in large part on the NAIC bill" (*Royal Drug*, 440 U.S. at 221)). In particular, as explained above (see pages 19-20, *supra*), Congress recognized that cooperation and joint agreements between primary insurers and reinsurers over the terms of the primary policy were standard and essential practices in the business of insurance.

In adopting the McCarran antitrust exemption, Congress full well realized that "boycott, coercion, and intimidation are not co-extensive with the offenses described in the Sherman Act." 91 Cong. Rec. 1487 (1945) (statement of Sen. Pepper). Rather, the boycott exception to the statutory safe harbor was designed to prevent companies from collectively excluding or discriminating against competitors or customers. As Representative Celler explained in reconciling the general antitrust immunity with the limited boycott exception, insurance companies were to be allowed "to come together and confer and arrange for rates, *but all companies should be permitted entrance to such a conference.* * * * There must be no boycott, no coercions, no economic sanctions." 90 Cong. Rec. 6560 (1944) (emphasis added). By ensuring access for all competitors wishing to participate in the business of insurance, Congress intended the boycott provision to safeguard competition on matters other than terms and conditions of insurance, such as service. See H.R. Rep. No. 873, at 9 (given "[u]niformity in rates and the like * * * [, t]he real competition in insurance is competition in service"); *Joint Hearing* at 304 (statement of Edward Williams, President of the Insurance Executives Association) ("There is competition in many

phases. * * * Competition in service, competition in agents, competition in many ways. * * * [Although] competition in rates has been established * * * not to be in the interest of the public," many "other kinds of competition" exist). As discussed above, it was the elimination of these other forms of competition through an absolute refusal to deal that gave rise to the existence of a boycott in *Barry*.

b. *The* SEUA *case*. The limited contours of the "boycott" exception are further illuminated by this Court's decision in *SEUA*. Congress passed the McCarran Act in the context of *SEUA*, and the critical statutory phrase "boycott, coercion, or intimidation" was taken directly from this Court's opinion (322 U.S. at 535, 562). See *Barry*, 438 U.S. at 561 (Stewart & Rehnquist, JJ., dissenting). Accordingly, the boycott exception is properly construed against the background of *SEUA*.

SEUA involved a classic cartel designed to exclude nonmember companies from the market. S.E.U.A. members, who controlled 90% of the relevant market in fire insurance, conspired "to compel persons who needed insurance to buy only from S.E.U.A. members." 322 U.S. at 535. Thus, the object of the conspiracy was to exclude all nonmember insurers from participating in this business. To that end, non-members were "cut off" from reinsurance and completely deprived of the "opportunity to reinsure their risks." *Ibid.* In addition, "independent sales agencies who defiantly represented non-S.E.U.A. companies were punished by a withdrawal of the right to represent the members of S.E.U.A.," and insurance customers "who purchased from non-S.E.U.A. companies were threatened with boycotts and withdrawal of all patronage" by S.E.U.A. members. *Id.* at 535-536. S.E.U.A. members also engaged in unfair trade practices by "disparag[ing]" non-S.E.U.A. companies. *Id.* at 535. Finally, the conspiracy was "effectively policed" by a network of S.E.U.A. bureaus and boards. *Id.* at 536.

It was these actions and enforcement mechanisms that the Court characterized as a "combination[] of insurance

companies to coerce, intimidate, and boycott competitors." 322 U.S. at 562. S.E.U.A.'s attempt to drive non-S.E.U.A. members from the market through an absolute refusal to deal with them on any terms—combined with the use of bureaus and boards to enforce compliance with the conspiracy—constituted precisely the sort of unjustified anti-competitive conduct that Congress intended to fall within the narrow boycott exception to the general anti-trust immunity provided for other types of joint activities that were part of the business of insurance.

The indictment in *SEUA* also alleged that S.E.U.A. members had agreed to fix the premiums charged for fire insurance. See 322 U.S. at 534. Significantly, however, the Court did *not* describe that agreement on rates as part of the alleged boycott. *Id.* at 535 ("[t]he conspirators *not only* fixed premium rates and agents' commissions, *but employed boycotts together with other types of coercion and intimidation*") (emphasis added). See also U.S. Br. 12 n.1 (No. 354 (O.T. 1943)) (defendants' proffered "justification [for the fixing of rates] would not extend to the boycotts, coercion, or other monopolistic tactics described in Count 2 of the indictment"); *Joint Hearing* at 636 (statement of Attorney General Biddle) (*SEUA* "was not merely a price-fixing case, but involved very serious boycotting"). This distinction between a rate-fixing agreement and a boycott makes clear that the Court in *SEUA*—and Congress in adopting the McCarran Act—understood that an agreement on rates or terms of insurance was not a boycott.

In sum, the boycott in *SEUA* involved an *absolute* refusal to deal and, as in *Barry*, was designed broadly to eliminate *all* competition among insurers, not just competition over terms and conditions of insurance. That conduct bears no resemblance to the allegations in this case. Unlike the boycott in *SEUA*, there is no claim here that defendants sought to deny anyone equal access to insurance or reinsurance, nor is there any claim that defendants maintained any mechanism to "police" their agreements. There is, in short, nothing to support the

court of appeals' unexplained statement that "the defendants have gone beyond joint action to their own regulation of the terms on which CGL and property insurance will be offered." Pet. App. 23a.

What plaintiffs' complaints *do* allege are agreements as to the terms and conditions on which insurance and reinsurance would be offered to *everyone*—conduct akin to the alleged agreement to set rates in *SEUA* that was considered *not* to be a boycott. As the history of the McCarran Act and this Court's decision in *Barry* confirm, a McCarran "boycott" is not established by such agreements, which do not exclude competitors from the business of insurance but simply specify the terms on which the participants are willing to do business.

B. Plaintiffs' Complaints Allege Nothing More Than Agreements On Terms And Conditions Of Insurance And Thus Do Not State A Boycott Claim

1. *The District Court Correctly Held That Plaintiffs' Allegations Involve Only The Formation And Implementation Of Agreements On Terms And Conditions Of Insurance*

For the reasons discussed above, a non-discriminatory agreement among insurers and reinsurers on the terms and conditions on which they will offer insurance cannot, as a matter of law, be deemed a boycott. The district court was right in concluding that plaintiffs have alleged nothing more than agreements over terms of insurance here.

As shown by their own statement in this Court (Br. in Opp. 2-5), plaintiffs' factual allegations, stripped of conclusory verbiage, assert only that (1) primary insurers "met with" reinsurers and "collectively" agreed upon the terms of insurance and reinsurance they would underwrite—*e.g.*, whether the advisory policy forms would be claims-made or occurrence forms, and whether the forms would cover pollution risks—and then communicated their positions to ISO; and (2) certain defendants

agreed upon the terms of reinsurance that would be offered in the market, and ISO discontinued statistical support for its superseded forms. Plaintiffs' briefs in the lower courts similarly make clear that this is the sum and substance of their boycott claim. For example, their reply brief on appeal (at 3) stated directly and unambiguously that

> the complaints allege a unified course of conduct composed of three analytically distinct but interdependent agreements. These are:
>
> 1. An agreement to create narrower terms of coverage;
> 2. An agreement to refuse to offer older, broader terms of coverage; and
> 3. An agreement to enforce agreement (2), above, on the rest of the market by (a) withdrawing reinsurance support for the older, broader terms of coverage; and (b) withdrawing ISO support services for the older, broader terms of coverage.

The first two sets of allegations, by plaintiffs' own characterization, involve protected agreements on the terms and conditions on which insurance would (and, conversely, would not) be offered. Likewise, the third set of allegations simply asserts that defendants conducted their business operations in accordance with those protected agreements.

Plaintiffs' entire boycott case therefore reduces to the contention that defendants agreed on terms and conditions of insurance and then adhered to their agreements in the market. Notably, nowhere in plaintiffs' boycott allegations is it asserted that defendant reinsurers absolutely refused to deal on any terms with the non-defendant primary insurers that were the "targets" of the alleged boycott or otherwise sought to exclude them from the market. The alleged agreements concerned the terms on which each of the defendants was willing to engage in the business of insurance, and plaintiffs make no claim

that any defendant reinsurer refused to deal with the boycott "targets" on those terms or discriminated against them by offering less favorable terms than were provided to the co-defendant primary insurers. Defendant reinsurers thus treated co-defendant primary insurers and "target" primary insurers exactly alike; reinsurance was equally available to both.

The Ninth Circuit did not take a different view of the *facts* alleged in the complaints. As summarized by the court of appeals, plaintiffs' critical allegations are that the defendant primary insurers "enlisted the reinsurers to compel capitulation by ISO and the insurers who had refused to go along with the Hartford demands" and that "the defendant reinsurers and London underwriters used their economic power, their refusal to reinsure, to force ISO and its recalcitrant members to accept the terms Hartford and its allies wanted." Pet. App. 22a, 24a.[16]

As explained above (see pages 1-2, 32-34, *supra*), these allegations involve precisely the kind of discussions and

[16] For present purposes the court of appeals' description may be taken as an accurate summary of plaintiffs' allegations. Plaintiffs' complaints, although prolix and disjointed, allege that (1) defendant primary insurers "enlisted" domestic and foreign reinsurers and others "to formulate a joint strategy" to change the 1984 proposed ISO forms (Cal. Cmplt. ¶¶ 64, 68, 73; Conn. Cmplt. ¶¶ 68, 72, 77); (2) defendants "met" and, after the primary insurers "communicated" to the reinsurers their objections to the proposed forms, "agreed" on a "coordinated effort" to obtain the desired changes through a "plan[]" and "announce[ments]" by the reinsurers that they would not write reinsurance on the proposed ISO forms (Cal. Cmplt. ¶¶ 64-68, 70-71, 80-82; Conn. Cmplt. ¶¶ 68-75, 84-86); (3) following ISO's changes in the proposed forms, defendant foreign reinsurers continued to make "public and private pronouncements" and entered into "joint agreements" that they would not write reinsurance for occurrence policies or pollution coverage (Cal. Cmplt. ¶¶ 87-95; Conn. Cmplt. ¶¶ 91-99); and (4) in 1987, following the states' approval of the revised ISO forms, ISO "withdrew its 'support'" of the superseded 1973 form by discontinuing data collection and actuarial services for the old form (Cal. Cmplt. ¶¶ 97-99; Conn. Cmplt. ¶¶ 101-103). Thus, although words like "boycott" and "coercion" are liberally interspersed throughout the complaints, these conclusory legal labels are unsupported by any allegations of *fact*.

agreements that Congress recognized are essential to the business of insurance and fall within the very heart of the McCarran immunity. Historically, and of necessity, primary insurers and reinsurers confer and agree upon the terms of primary insurance for which reinsurers are willing to issue reinsurance. Because reinsurers assume a portion of the primary insurer's risk, the coverage of the primary policy is of immediate and legitimate concern to reinsurers. Thus, they are not "strangers to the * * * dispute." *Barry*, 438 U.S. at 552. And because the placement of reinsurance typically involves a number of reinsurers, standardized primary insurance forms acceptable to large groups of reinsurers are vital to the efficient operation of the insurance market.

Against that background, the legal insufficiency of plaintiffs' allegations becomes evident. Nothing in plaintiffs' complaints or briefs suggests that the alleged "enlist[ment]" of reinsurers was anything but an agreement among defendant primary insurers and reinsurers based on the business judgment and economic self-interest of each company as to acceptable terms and conditions of insurance. Similarly, plaintiffs have pleaded no facts suggesting that the alleged effort to "compel" and "coerc[e]" ISO to amend its proposed forms was anything more than the direct consequence of the asserted agreement among defendant insurers and reinsurers that they would not underwrite coverage on those terms. It is hardly surprising, and surely not a ground for finding a boycott, that ISO modified a proposed standardized advisory form that defendant primary insurers and reinsurers opposed and would not use in their businesses.

By the same token, plaintiffs have presented no allegation of fact indicating that the asserted "coercion" of non-defendant primary insurers to use the claims-made form was anything other than the effect in the market of the determination by the foreign reinsurers (petitioners in Nos. 91-1128 and 91-1146) not to write reinsurance for certain primary coverages. Finally, the alleged discontinuance of statistical support services for the super-

seded and obsolete 1973 CGL forms (which services were in fact maintained in the two states where the 1986 forms were not approved) was, as the district court observed (Pet. App. 55a n.20), "on its face reasonable conduct that one would expect in the normal course of business" and was merely incidental to the implementation of the state-approved 1986 CGL forms. Nothing in the boycott exception requires ISO to take affirmative steps to facilitate the use of multiple insurance forms in the marketplace, which would be contrary to the uniformity of forms that the McCarran Act was designed to foster under the aegis of state supervision. See pages 32-34, *supra*.

In these circumstances, the district court correctly rejected plaintiffs' argument that a protected joint agreement can be transformed into an unprotected boycott by the fact that the agreement is actually implemented in practice. As the court explained (Pet. App. 56a-57a):

> The purpose of McCarran Act immunity is to permit joint action by insurers and underwriters within the states' regulatory schemes to formulate policy terms and determine coverage. While it is not a necessary part of the policy development process that the participants would then offer substantially similar policies to the public, it is a consequence that could be reasonably anticipated. To subject the participants in the collective form development process to the risk of antitrust liability for using the product of that process would effectually nullify the McCarran Act.

The court thus recognized the common-sense principle that a joint agreement cannot be separated from its practical effects, noting that the alleged agreement here did not become a boycott simply because it assertedly had adverse economic consequences for competitors of defendant primary insurers. *Id.* at 57a. Other courts have reached the same conclusion. See, *e.g.*, *Proctor* v. *State Farm Mut. Auto. Ins. Co.*, 561 F.2d 262, 275 (D.C. Cir. 1977) ("economic pressure" on competitors to accede to

an agreement does not constitute "the degree of coercive enforcement activity required to convert mere cooperation or concert of action into 'boycott, coercion, or intimidation'"), vacated in light of *Royal Drug*, 440 U.S. 942 (1979); *Ocean State Physicians Health Plan* v. *Blue Cross*, 883 F.2d 1101, 1109 n.9 (1st Cir. 1989) (the boycott exception does not "include situations where options have not been entirely closed off to the allegedly coerced parties, even though such options may have been made more expensive"). In line with these authorities, the Solicitor General agrees that a protected "agreement does not become a non-immune boycott merely because it has some effect on other insurers." U.S. Pet. Br. 13.

The district court also understood that the controlling boycott standard cannot be defeated by artful pleading. Judge Schwarzer properly held that a boycott claim could not be based on "[c]onclusory allegations" (Pet. App. 57a) that were "just semantics. * * * [Plaintiffs] try to enlarge on that [alleged agreement not to offer certain coverage] by dressing it up in pejorative language which doesn't seem to add anything to the fundamental allegations in this case." 9/15/89 Tr. 7-8. This Court has cautioned that "in a case of this magnitude, a district court must retain the power to insist upon some specificity of pleading before allowing a potentially massive factual controversy to proceed." *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983). And it is settled law in the lower federal courts that boilerplate assertions and legal conclusions are not sufficient to require that a case—especially an enormous antitrust case—proceed past a motion to dismiss.[17] Despite the states' extensive pre-

[17] See, *e.g.*, *Pennsylvania* v. *PepsiCo, Inc.*, 836 F.2d 173, 182-183 (3d Cir. 1988) (emphasis omitted) (because "litigation today is too expensive a process to waste time on fanciful claims," a plaintiff "may not evade the requirements of proper pleading 'by merely alleging a bare legal conclusion'" and instead "must plead the essential facts of a * * * group boycott"; "[a]lthough dressed in the pejorative appellation 'group boycott,' the specific conduct complained of in this case, stripped of name-calling or label-pasting, is nothing more than conduct expressly permitted by [law]"); *Sutliff, Inc.* v. *Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) ("[T]he complaint does not state a claim under the federal antitrust laws, even though it uses antitrust language * * *. The heavy costs of modern federal litigation, especially antitrust litigation, and the mounting caseload pressures on the federal courts, counsel against [discovery and trial] if there is no reasonable prospect that the plaintiff can make out a cause of action from the events narrated in the complaint. * * * And the pleader will not be allowed to evade this requirement by attaching a bare legal conclusion to the facts that he narrates").

complaint investigation and the availability of discovery in the trial court, plaintiffs failed to substantiate their boycott claim with any supporting facts.

2. *The Court Of Appeals Erred In Concluding That Plaintiffs' Allegations Involve "Much More" Than Agreements On Terms And Conditions Of Insurance*

The court of appeals misconceived the controlling boycott standard by ignoring the requirement that a McCarran Act boycott must involve conduct more broadly restrictive of competition than an agreement on rates and terms of insurance, such as an absolute refusal to deal on any terms or discriminatory activity that excludes competitors or customers. Instead, it held (Pet. App. 23a) that "[t]he evil of a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms."

The problem with the court's approach is that it "effective[ly] prohibit[s] * * * any horizontal agreement among insurance competitors" and thus "deprives McCarran-Ferguson immunity of any practical effect." Note, 105 HARV. L. REV. at 1417, 1418. For example, the Ninth Circuit's view (shared by plaintiffs, see Br. in Opp. 10-11 & n.9) that a so-called "conditional refusal to deal" is a

boycott within the meaning of the McCarran Act would prohibit joint agreements to provide insurance only on specified terms. Such a result would be flatly contrary to *Barry*, *SEUA*, and McCarran's legislative history (see pages 27-37, *supra*) and would allow the narrow boycott exception to "swallow" the broad McCarran immunity for agreements on terms and conditions of insurance. *In re Workers' Compensation Ins. Antitrust Litig.*, 867 F.2d 1552, 1561 (8th Cir. 1989). As Judge McGowan has explained:

> Logically speaking, a simple agreement among insurance companies to charge certain premium rates could be viewed as a boycott agreement, since its observance would result in a collective refusal to deal with policyholders except at a fixed price. But the Supreme Court's opinion in *South-Eastern Underwriters* did not characterize the basic rate-fixing agreement in that case in terms of "boycott, coercion or intimidation"; those terms were reserved for the additional activities utilized to enforce the agreement. Since the McCarran Act was passed in response to *South-Eastern Underwriters*, and since the construction of the boycott provision to encompass a simple rate-fixing agreement would indeed emasculate the Act's antitrust exemption, it is reasonable to infer that * * * something in the way of enforcement activity would be required to make out a claim of "boycott, coercion or intimidation" within the meaning of the Act.

Proctor, 561 F.2d at 274. Because defendants here "were actually agreeing on coverage issues," the Ninth Circuit's decision "has broadened 'boycott' to encompass activities which concern the terms and conditions of insurance." Von Kalinowski, ANTITRUST REPORT at 5.

The court of appeals sought to justify its boycott holding by asserting that defendants were "charged with much more" than "confer[ring] and agree[ing]" on terms of insurance (Pet. App. 21a):

> [Defendants] are charged with much more: with agreeing to refuse reinsurance for CGL risks unless ISO amended its 1984 CGL form; with coercing ISO and ISO members to adopt the terms the defendants wanted; with coercing primary insurers to use the claims-made form; with agreeing to exclude from all casualty and property treaty reinsurance written in London all pollution coverage for American risks.

It is apparent, for the reasons previously discussed (see pages 37-43, *supra*), that these allegations do not support the court of appeals' "much more" conclusion. In each instance cited by the Ninth Circuit, the alleged action amounted to *nothing* more than the formation and implementation of non-discriminatory agreements as to the risks that defendant insurers and reinsurers were willing to cover.[18] Nowhere, it should be emphasized, have plaintiffs alleged any form of "coercion" or "compulsion" other than the natural effect in the market of these agreements. That such agreements among insurance companies are described with derogatory rhetoric does not transform them from protected joint activity into unprotected boycotts. See Note, 105 HARV. L. REV. at 1419 (the Ninth Circuit "neglected a functional scrutiny of boycotts in favor of conclusory labels").

In addition to lacking any factual support in this record, the Ninth Circuit's "much more" approach fails to provide necessary guidance for the insurance industry and antitrust enforcement officials, imposes serious burdens on the federal judicial system, and threatens to eviscerate the core purposes of the McCarran-Ferguson Act. First, the court of appeals' opinion provides *no* meaningful standards to distinguish protected joint activities from unprotected boycotts. See von Kalinowski, ANTITRUST REPORT at 5 ("[t]he Ninth Circuit failed to meaningfully articulate guidance on how to distinguish

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[18] Indeed, our petition for certiorari (at 24-25) challenged plaintiffs to support the court of appeals' assertion that this case involves "much more" than such agreements, but they were unable to do so despite their extensive pre-complaint investigation. Br. in Opp. 2-5.

between agreements on coverage and terms and other understandings"); see also *Quill Corp.* v. *North Dakota*, 112 S. Ct. 1904, 1914-1915 (1992) (discussing advantages of "safe harbors" and "bright-line rules"). All those affected by the boycott issue—insurance companies, state insurance regulators, government antitrust enforcers, and private plaintiffs—have a pressing need for a legal rule that can be readily understood and followed. However, the court's nebulous "much more" ruling, devoid of objective criteria, leaves them completely in the dark on the critically important and recurring issue of the dividing line between permissible joint activity and impermissible boycotts.

The special nature of insurance underscores the acute need for clear rules here. The Court has recognized that insurance companies have a "vital" interest in being able to rely upon "governing legal rules" to structure their operations to accommodate risks over long periods of time. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 246-247 (1978). The boycott question presented in this case implicates the most basic operations of the business of insurance: what are insurers permitted to do in formulating and implementing agreements on terms of insurance? A legal test that furnishes only an uncertain answer to that question is a prescription for confusion and diminished efficiency as insurers are deterred by concerns that beneficial and long-accepted practices might someday be found to involve "much more" than protected agreements under the Ninth Circuit's amorphous decision.

Second, the court of appeals' "much more" boycott test fails to furnish a workable standard for weeding out antitrust claims against insurers that do not belong in federal court. The onus of massive antitrust litigation on defendants (as well as on the already overcrowded federal court system) is well known. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 344-345 (1979). At the same time, the Sherman Act's generous remedies of treble damages and attorneys' fees provide a powerful incentive for plain-

tiffs to bring unmeritorious litigation. As this Court has recognized in a related context:

> [E]ven a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial *so long as he may prevent the suit from being resolved against him by dismissal or summary judgment.*

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975) (emphasis added).

As *Blue Chip Stamps* suggests, it is vital for district courts to be able to identify and dispose of unwarranted claims prior to trial. See also *Associated General Contractors*, 459 U.S. at 528 n.17 ("[h]ad the District Court required [plaintiff] to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss, it might well have been evident that no violation of law had been alleged"); *Reiter*, 442 U.S. at 345 ("[d]istrict courts must be especially alert to identify frivolous claims" and must "exercise sound discretion and use the tools available"); U.S. Pet. Br. 7 n.3 (commending Judge Schwarzer's "efforts to require the parties to focus their contentions and resolve as many legal and factual issues as possible without trial"). In recent years this Court increasingly has stressed the propriety and importance of such pre-trial dispositions. See, *e.g.*, *Matsushita Elec. Indus. Co.* v. *Zenith Radio*, 475 U.S. 574, 587 (1986). To permit resolution by pre-trial motion, however, the governing legal standard must be reasonably clear. The Ninth Circuit's "much more" approach is utterly incapable of practical application to dismiss groundless boycott claims before trial.

Third, and of perhaps greatest concern, the court of appeals' lax interpretation of the boycott exception seriously impairs the McCarran Act's federalism policy of protecting state regulation of insurance from federal antitrust interference. In response to a tort crisis that unforeseeably expanded the scope of covered risks and adversely affected the economic viability of existing poli-

cies, defendants, it is alleged, agreed upon revisions to the ISO standardized advisory forms. The proposed revisions were "the subject of widespread debate and controversy in the insurance industry" (Pet. App. 37a), and state insurance departments carried out a review process of unprecedented thoroughness in which the entire spectrum of views on the proposed forms—including those of state attorneys general—were exhaustively aired. See pages 6-7, *supra*; Banfield Aff. ¶¶ 8-20. Based on this extensive two-year review process, the proposed forms were subject to major modifications on four occasions to respond to the concerns of state regulators. In the end, the overwhelming majority of states approved the revised forms as being in the public interest, and new policies written on those forms began to be issued in the states (and *only* in the states) that granted such approval. See pages 7-8, *supra*.

In the face of plaintiffs' unsuccessful attempt to defeat the revised forms before state insurance commissioners, the Ninth Circuit has allowed them to launch a collateral attack in federal court on the development and implementation of the approved forms, thereby circumventing the state regulatory process simply through resort to artful antitrust pleading. The state attorneys general have correctly described the suit as "'a nuclear attack on the insurance industry'"[19] for the avowed purpose of "'restructur[ing] the industry.'"[20] Plaintiffs seek nothing less than a reformation of insurers' "'routine business practices'"[21] and have requested sweeping relief (see pages 9-10 note 6, *supra*) that would "'shake the insurance industry to its foundations.'"[22] Plaintiffs' un-

[19] Adler, *Drawing Battle Lines: Activists Declare War on Insurers*, BUS. INS., Aug. 8, 1988, at 1, quoting former West Virginia Attorney General Charles G. Brown.

[20] Kriz, 1988 NAT'L J. at 2598, quoting former Massachusetts Attorney General James M. Shannon.

[21] Stansky, *Massive Insurance Suit Alive and Well*, CONN. L. TRIB., June 24, 1991, at 17, quoting New Jersey Deputy Attorney General Laurel Price (emphasis added).

[22] *Ibid.*

varnished attempt to have a federal court impose insurance forms and practices radically different from those approved by state insurance regulators—based on the expressed view of the attorneys general that "'[s]tate [insurance] regulation is clearly lousy'"[23]—represents a frontal assault on the McCarran Act.[24] The boycott exception cannot rationally be construed to sanction such a direct nullification of the core policies of the Act.[25]

The overarching purpose of the McCarran Act was to "free[] the insurance business of antitrust rules that would reduce it to a shambles." R. Posner & F. Easterbrook, ANTITRUST 1046 (2d ed. 1981); see pages 32-33, *supra*. The Act was designed to entrust oversight of the insurance industry to expert and politically accountable state insurance regulators rather than to lay juries applying generalized Sherman Act principles.[26] The allegations in this case fall squarely within the zone of activities traditionally regulated by state insurance departments. Plaintiffs' revolutionary interpretation of the boycott exception would swallow the basic rule of antitrust immunity and, by transforming protected joint agreements into

[23] Adler, BUS. INS. at 77, quoting former West Virginia Attorney General Charles G. Brown.

[24] Indeed, the state attorneys general brought this litigation without the concurrence (or in many instances even the knowledge) of their state insurance commissioners. See Bradford, *Antitrust Suits a Political Ploy: Ex-Regulators*, BUS. INS., Apr. 11, 1988, at 1.

[25] In contrast to the agreement at issue in *Barry*—which did not set terms and conditions of insurance but rather allocated customers among the defendant insurers (*see* 438 U.S. at 553-554)—the terms here were intensively scrutinized by state regulators. See pages 6-8, *supra*; see also Note, 105 HARV. L. REV. at 1419.

[26] As a leading commentator has pointed out, a lax interpretation of the boycott standard under *Barry* would loose "[a]n avalanche of cases" in federal court and would be "seized upon quickly in an attempt to use federal courts to regulate the insurance business." Kimball & Heaney, *Emasculation of the McCarran-Ferguson Act: A Study in Judicial Activism*, 1985 UTAH L. REV. 1, 46-47 & n.171.

unprotected boycotts, would result in precisely the "shambles" that Congress intended to prevent.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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November 1992

STATUTORY APPENDIX

1. The Sherman Act, 15 U.S.C. §§ 1 *et seq.*, provides in pertinent part:

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination * * *, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

2. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, provides in pertinent part:

§ 1011. Declaration of policy

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known

as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

§ 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act applicable to agreements to, or acts of, boycott, coercion, or intimidation

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

(2) (17)

Nos. 91-1111 and 91-1128

In the

Supreme Court of the United States

October Term, 1992

HARTFORD FIRE INSURANCE CO., et al.,
Petitioners,
v.
STATE OF CALIFORNIA, et al.,
Respondents.

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, et al.,
Petitioners,
v.
STATE OF CALIFORNIA, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Some of the defendants named in the respondent States' multi-count complaints, including petitioners, are reinsurers based in England. Some counts of the complaints allege that these English-based reinsurers conspired among themselves to restrain trade, in violation of Section 1 of the Sherman Act.

The question presented is:

Whether Section 1, consistent Supreme Court precedent interpreting it, and the Foreign Trade Antitrust Improvements Act require this Court to assert jurisdiction over these counts, when these reinsurers intended to affect markets in the United States and their conduct had direct, substantial, and foreseeable effects on those American markets, particularly when an assertion of jurisdiction would not conflict with international or foreign law?

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Nos. 91-1111 and 91-1128

In the

Supreme Court of the United States

October Term, 1992

HARTFORD FIRE INSURANCE CO., et al.,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, et al.,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT STATES IN NO. 91-1128

STATEMENT

In these cases, the nineteen respondent States[1] sued primary insurers, reinsurers, and others principally under Section 1 of the Sherman Act, 15 U.S.C. § 1 (1988), for conspiracies in restraint of trade. The States allege that the interrelated conspiracies were designed to prevent American governments and businesses from obtaining the insurance products that they needed. Some of the defendants are reinsurers based in London, England (the "Reinsurers").[2] In some instances, the Reinsurers are alleged to have conspired with their American co-defendants; in others, they are charged with conspiring among themselves. The subject of the present case is the Reinsurers' contention that those latter instances are beyond the scrutiny of American antitrust laws. The court below found, and the States contend, that they are not.

A. FACTS

The complaints set forth all the relevant facts on which the parties and the courts below have relied. This section is drawn from the facts that those complaints allege.

The conduct at issue throughout these cases was directed at, and affected, the market for insurance risks within the United States. Those Reinsurers who are petitioners here (the "Reinsurer Petitioners") are members of

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[1] Each of the nineteen respondent States ("States") filed its own complaint. The California complaint ("Cal. Compt.") is representative of the "first wave" complaints filed in March 1988, *see* Joint Appendix ("JA")-5-56, and the Connecticut complaint ("Conn. Compt.") is representative of the "second wave" complaints filed in June 1988, *see* JA-57-102. The complaints are very similar. Citations will be made to the Connecticut complaint unless the context requires otherwise.

[2] Some reinsurance companies that are defendants are based in the United States. The claims against them are not before this Court in the instant case.

Lloyd's of London ("Lloyd's"), an insurance exchange based in London.[3] Conn. Compt. ¶ 4(h), JA-61-62. Other Reinsurers participate in the London Company Market, which includes reinsurers based in London who are not part of Lloyd's. *Id.* ¶ 4(i), JA-62. Lloyd's is closely tied to the United States. The United States market is by far the largest market for Lloyd's, and Lloyd's is the largest reinsurer of United States business. Proffered Facts ¶ V(D), JA-255.[4] The London Company Market consists of many entities owned by Americans, including many of the Reinsurers.[5]

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[3] Petitioners are Peter N. Miller ("Miller"), Robin A.G. Jackson ("Jackson"), Merrett Underwriting Agency Management Limited ("Merrett"), Three Quays Underwriting Management Limited ("Three Quays"), Janson Green Management Limited ("Janson Green"), Murray Laurence & Partners, D.P. Mann Underwriting Agency Limited, Edwards & Payne (Underwriting Agencies) Limited, and Sturge Reinsurance Syndicate Management Limited ("Sturge"). Miller was, during the period relevant to the complaints, the Chairman of the Council of Lloyd's of London. Conn. Compt. ¶ 27, JA-69. Jackson was an underwriter and agent for Merrett. Conn. Compt. ¶ 18, JA-67.

[4] On October 5, 1989, the States filed with the district court a motion and supporting memorandum seeking, *inter alia*, leave to amend their complaints. This pleading was accompanied by a synopsis of "Proffered Facts." The district court denied the States' motion. The court of appeals ruled that this denial was error. Appendix to Petition for Certiorari ("A")-26-27. Defendants have not asked this Court to review that ruling. The States therefore rely upon these Proffered Facts as though they had been alleged in the complaints.

[5] In addition to the nine Reinsurer Petitioners, *see* n.3, *supra*, seven other Reinsurers have joined Petitioners' brief. Merrett Br. 3 n.4. Of these, six are owned and controlled by United States corporations, including defendants Aetna and CIGNA and the parent corporation of defendant Hartford. Proffered Facts ¶ V(A)(1), JA-254. These six are CNA Re (U.K.) Ltd., Kemper Reinsurance London, Ltd., Excess Insurance Company,

The Reinsurers joined in a scheme, first set in motion by American primary insurer defendants, to limit insurance coverage to American primary insurers and insurance consumers. Part of the scheme involved conspiracies with those primary insurer defendants to withdraw certain types of coverage from the United States market. Petitioner Merrett Underwriting Agency Management Limited ("Merrett"), for example, is named as a defendant in almost every count of the complaints. *See, e.g.*, Conn. Compt. ¶ 19, JA-67. Representatives of Merrett conspired with the American defendants to eliminate or restrict primary insurance coverage. Toward this end, Merrett representatives met in the United States with their American co-conspirators to plan and implement those restrictions. The Merrett representatives also met in the United States with their American targets and threatened those American targets. *Id.* ¶¶ 82-89, JA-80-82. Reinsurers Three Quays Underwriting Management Limited ("Three Quays"), Janson Green Management Limited ("Janson Green"), Robin A.G. Jackson, and Peter N. Miller engaged in similar conduct. *Id.* Reinsurer Petitioners do not here challenge the assertion of jurisdiction over those claims.

When the scheme needed additional support, Merrett, Three Quays, Janson Green, and Messrs. Jackson and Miller joined with other Reinsurers in further conspiratorial acts to limit primary insurance coverage within the United States. These additional conspiratorial acts are

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Ltd., Terra Nova Insurance Company Limited, Unionamerica Insurance Company Ltd., and Continental Reinsurance Corporation (U.K.) Limited. The other joining defendant is Ballantyne, McKean & Sullivan Limited ("Ballantyne McKean"). Three other Reinsurers have neither petitioned this Court nor joined in the Reinsurer Petitioners' briefs.

the subject of the instant petition.[6] They involve reinsurance and retrocessional insurance.

Reinsurance is a transaction whereby one insurance company, the reinsurer, agrees to indemnify another insurance company, the primary (or "ceding") insurer, for a designated portion of the insurance risks underwritten by the primary insurer. Conn. Compt. ¶ 4(p), JA-63. Retrocessional insurance is a further layering of insurance; functionally it is another form of reinsurance. *Id.* ¶ 4(r), JA-63. Reinsurance protects the primary insurer from catastrophic losses, and is heavily relied upon by prudent primary insurers. *Id.* ¶ 4(p), JA-63. It also allows the primary insurer to sell more insurance than its own financial capacity might otherwise permit. *Id.* Thus, the availability of reinsurance affects the ability and willingness of primary insurers to provide insurance to their customers. *Id.* The critical relationship between reinsurance and primary insurance explains, in part, why the Reinsurers were enlisted by their American colleagues, and why American commerce was so profoundly affected by the conduct of the Reinsurers.

The claims at issue describe how the Reinsurers directly targeted *American* primary insurers and foresaw that their targeting would affect those *American* concerns. They further describe how the Reinsurers created profound effects *in the United States*. The Reinsurers withheld reinsurance, an essential input of *American* primary insurance, from *American* insurers in order to compel them not to offer coverage in *American* insurance markets.

The first of the claims at issue asserts that the conspirators engaged in a boycott to restrain the market for reinsurance coverage for *North American* risks. Conn. Compt. ¶¶ 125-129, JA-92-94. The boycott alleged in this

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[6] They are the Third, Fourth, and Fifth Claims of the Connecticut-style complaints and the analogous Fifth, Sixth, and Eighth Claims of the California-style complaints. Conn. Compt. ¶¶ 125-39, JA-92-97; Cal. Compt. ¶¶ 131-40, 146-50, JA-43-49.

claim, and all the others at issue here, did not involve worldwide reinsurance coverage, of which American risks were only a part. Rather, the boycotts were directed solely at North American or, more particularly, United States risks.

To accomplish the goal of restraining the market for coverage of North American risks, the Reinsurers employed two strategies. Both were designed to restrict the same coverage that their American co-defendants wanted to limit. First, the Reinsurers stated that they would not reinsure primary insurers who wrote on an "occurrence" basis. Second, they redesigned reinsurance treaties to eliminate coverage for "long tail" risks. *Id.* ¶ 91, JA-83.[7] The first strategy had a substantial effect in the United States, because the targeted primary insurers insured American risks. *Id.* ¶ 92, JA-83. Also, some of the Reinsurers "collectively refused to write new treaties for, or to renew long-standing treaties with, *primary U.S. insurers.*" *Id.* (emphasis added). As to the second strategy, the boycotters imposed the unlawful restrictions "within their treaties with *U.S. primary insurance companies.*" *Id.* ¶ 94, JA-84 (emphasis added). The States claim that, as a result of the Reinsurers' conduct, certain types of insurance coverage became unavailable, or were available only at an increased price, *in the United States. Id.* ¶ 129, JA-94.

The next claim at issue charges the Reinsurers with conspiring to restrain the market for casualty pollution coverage for *North American* risks. Conn. Compt. ¶¶ 130-134, JA-94-95. The complaints expressly allege

[7] "Occurrence" coverage protects the insured against injuries or losses, whenever claimed, that occur during the policy period. Conn. Compt. ¶ 4(m), JA-62. It differs from "claims-made" coverage, under which the insurer is liable only for claims made during the policy period. *Id.* ¶ 4(a), JA-60. "Long tail risks" describe situations where claims may not be filed until many years after the occurrence that gives rise to the claims. *Id.* ¶ 4(v), JA-64.

that the Reinsurers agreed that North American casualty reinsurance treaties would include a total pollution exclusion. In order to consummate this agreement, representatives of Petitioner Sturge met with other leading Lloyd's underwriters and reinsurers. *Id.* ¶¶ 97-99, JA-84-85. As a result of the Reinsurers' agreement, pollution liability coverage became almost entirely unavailable, or available only at dramatically increased prices, *in the United States. Id.* ¶¶ 134, JA-95.

The final claim at issue charges the Reinsurers with conspiring to restrain the market for property insurance coverage for *North American* pollution, seepage, and contamination risks. Conn. Compt. ¶¶ 135-139, JA-95-97. That claim concerns the Non Marine London Market Agreement 1987 ("London Market Agreement"), which was signed by Lloyd's and London Company Market firms and *North American* companies. Conn. Compt. ¶¶ 111-13, JA-87-88. In this Agreement, the signatories solemnly promised to use "their best endeavours to ensure that *all U.S.A.* and Canadian *exposed insurance/reinsurance business* . . . will only be written where the original business includes a seepage and pollution exclusion wherever legal and applicable." *Id.* ¶ 112, JA-88 (quoting Agreement) (emphasis added). The effects of this Agreement were substantial; property insurance and reinsurance policies for *American* risks excluded seepage, pollution and contamination coverage, or provided such coverage only at increased prices. *Id.* ¶¶ 114, 139, JA-88, 97.

This conduct was not part of the usual practice at Lloyd's or in the London Company Market. Both markets operate on a principle of free competition that does not condone boycotts. Proffered Facts ¶ V(F), JA-255-56. Further, advance agreements prohibiting participants from writing certain types of coverage are inconsistent with the custom and practice in both markets. *Id.*

B. PROCEEDINGS AND DECISIONS BELOW.

In March 1988, eight states filed complaints charging the conduct described above. JA-3. Eleven other states later filed substantially similar complaints. *Id.* The district court ordered, as part of its pre-trial case management, that no motion be filed that would turn on disputable issues of evidentiary fact, and that no discovery would be permitted into disputable issues of fact. JA-103-05, 108. As a result, no discovery was conducted, and this case comes to this Court on a completely undeveloped factual record.[8] The Reinsurers filed motions to dismiss. They argued that the claims at issue were barred by the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a (1988), as well as by considerations of international comity.

Relying exclusively on the allegations of the complaints, the district court held that the claims at issue stated a cause of action under Section 1 of the Sherman Act. A-70-71. It further held that those claims satisfy the requirements of the FTAIA, in that they allege that the Reinsurers' conduct produced direct, substantial, and foreseeable effects in the United States. *Id.*

Although the district court suggested that this finding might dispose of all the matters at issue in the instant petition, it felt obliged to apply the "jurisdictional rule of reason" required by the Ninth Circuit's *Timberlane* cases.[9] A-70 n.28. This test obliges a court that is considering whether to assert jurisdiction to engage in a three step process, and in the third step to balance seven factors in

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[8] The pre-filing investigation conducted by a few of the States was not the same as, nor a substitute for, discovery conducted under the Federal Rules of Civil Procedure.

[9] *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) ("*Timberlane I*"), *after remand*, 749 F.2d 1378 (9th Cir. 1984) ("*Timberlane II*"), *cert. denied*, 472 U.S. 1032 (1985).

order to accommodate considerations of comity.[10] A-70-72. In applying the *Timberlane* test the district court found that it was foreseeable that Petitioners' conduct would affect the United States and that the effects of that conduct occurred predominantly in the United States. A-76-77. It nevertheless found that asserting jurisdiction over these claims would conflict with English law and policy, and treated that conflict as dispositive unless outweighed by other factors. A-75. It therefore dismissed the claims at issue. A-77-78.

The States filed a timely motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure asking the district court to reconsider its holding. In that motion, the States also sought leave to amend their complaints to cure any pleading defects that the district court might have found. A-78. The district court denied that motion. *Id.*

The States appealed to the Ninth Circuit Court of Appeals. A panel of that Court, consisting of Judges Noonan, Beezer, and Singleton, agreed that the complaints set out violations of Section 1 of the Sherman Act and satisfied the requirements of the FTAIA. A-27-28. On the international comity issue, it reversed the district court's dismissal and ordered the States' complaints reinstated. A-27-31. Although it agreed with the district court that the claims at issue conflicted with foreign law, the court of appeals held that all of the other *Timberlane* factors favored assertion of jurisdiction and so outweighed the conflict factor. *Id.*. Most notably, it held that substantially all of the effects of the Reinsurers' conduct took place in the United States. A-30. "[T]he actions of the foreign defendants has had the kind of 'real economic consequences' for the American economy that strongly weigh in favor of the exercise of jurisdiction." *Id.* (citations omitted). The court of appeals also stated that the FTAIA should inform comity analysis; it would only be in

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[10] The seven *Timberlane* factors are set forth at p. 39 n.40, *infra*.

an unusual case that a court would decline jurisdiction when conduct produced direct, substantial, and reasonably foreseeable effects in the United States. A-28.

The Reinsurers filed a petition for rehearing and a request for rehearing *en banc* with the court of appeals. Their petition and request was denied. No judge of the circuit voted for rehearing. A-84-92.

C. PROCEEDINGS IN THIS COURT.

Petition No. 91-1128 sought review of the international comity holdings of the court of appeals. On October 5, 1992, this Court granted a writ of certiorari in No. 91-1128. JA-308. Petitioner Merrett filed a brief ("Merrett Br.") on behalf of itself and seven other Petitioners ("Merrett Petitioners"). Petitioner Sturge filed its own brief ("Sturge Br."). The United Kingdom and Canada have filed *amicus* briefs ("U.K. Br."; "Canada Br.") on behalf of Reinsurer Petitioners.

SUMMARY OF ARGUMENT

The Sherman Act applies to conduct that is intended to affect the United States and that does materially affect this country, regardless of where that conduct occurred. That has been the consistent teaching of this Court's precedents for half a century, yet the Reinsurer Petitioners never even mention these Supreme Court cases. *Stare decisis* requires this Court to adhere to these precedents, particularly in the area of statutory construction. The Reinsurers expressly intended to affect the American insurance market. Their conduct had substantially all its effects in the United States. Because the Supreme Court's test is thus clearly met here, this Court must, on the record before it, assert jurisdiction over the allegations in the complaints. In so doing, it must affirm the decision of the court of appeals.

A recent Congressional enactment also compels this Court to assert jurisdiction here. The Foreign Trade

Antitrust Improvements Act applies the Sherman Act to foreign conduct that has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. The plain meaning of the statute compels this application. In this case, both courts below held that the Reinsurers' conduct had the requisite effect. The Reinsurer Petitioners have not challenged those holdings in this Court.

The need to assert subject matter jurisdiction is all the more striking in light of the complete absence of conflict between American law on the one hand, and international and English law on the other. Like American law, international law recognizes that the presence of effects within the territory of a country can justify that country in exercising subject matter jurisdiction. Further, the exercise of jurisdiction here would not result in any conflict with English law and policy. That law either prohibits, or at most merely permits, the sort of conduct at issue here. This does not create a conflict. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962). This Court has described only two circumstances in which it might abstain from Sherman Act jurisdiction in cases involving foreign conduct. One is where a foreign sovereign compelled the conduct, and the other is where that sovereign undertook the conduct. Neither is even arguably at issue here.

The Reinsurer Petitioners ignore decades of Supreme Court precedent, clear statutory language, and long-established doctrines. Instead, they propose that this Court adopt a new abstention doctrine in the form of a multi-factor balancing test. In another case that the Reinsurer Petitioners do not even cite, this Court unanimously refused to apply a new "vague doctrine of abstention" to an antitrust claim involving foreign conduct: "Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 406, 409 (1990).

A vague multi-factor test would not provide a useful addition to this Court's precedents. If that test is interpreted to give primacy to an intent to harm American commerce and the presence of material effects in the United States, it would yield the same result as this Court's case law. Only by elevating the Reinsurer Petitioners' unsupported assertions of a conflict with foreign law over other factors would the analysis produce a different result. Thus, as the court below held, the complaints satisfy the requirements of a *Timberlane*-style multi-factor test, properly applied. Any other interpretation of this multi-factor test, certainly any that would deny jurisdiction in this case, would directly conflict with the Sherman Act and this Court's precedents.

ARGUMENT

I. THIS COURT SHOULD FOLLOW THE SHERMAN ACT, AND HALF A CENTURY OF CONSISTENT PRECEDENT INTERPRETING IT, BY DECIDING THAT AMERICAN COURTS SHOULD ADJUDICATE ANTITRUST CLAIMS WHERE THE CONDUCT IS INTENDED TO AFFECT THE UNITED STATES AND WHERE IT HAS A MATERIAL EFFECT IN THIS COUNTRY.

The States allege that the Reinsurers intended to affect American commerce and succeeded in doing so by collectively withdrawing necessary components of the American insurance package. Under settled principles decided by this Court over almost fifty years, the Sherman Act confers jurisdiction over these allegations.

A. The Intent and Material Effects Test Has Been Followed by This Court for Almost Half a Century.

"[C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). Section 1 of the Sherman Act prohibits "[e]very . . . conspiracy, in restraint of trade . . . with foreign nations."[11] For almost half a century, this Court has construed that language to cover foreign conduct that is intended to have, and has, material effects in this country. Although they scarcely mention these precedents, Reinsurer Petitioners ask this Court to overrule them and set a new standard for jurisdiction.

The seminal decision, *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*") (L. Hand, J.), although formally a Second Circuit case, "was decided . . . under unique circumstances which add to its weight as precedent." *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946).[12] The circuit court panel, acting as the delegatee of this Court, held that a conspiracy consisting solely of conduct by foreigners that took place entirely outside the United States could be subject to liability under Section 1 of the Sherman Act if the parties intended to, and did, materially affect United States commerce. *Alcoa*, 148 F.2d at 439-45. *Alcoa*'s holding is consistent with, and builds upon, earlier Supreme Court precedent.[13]

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[11] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1988).

[12] This Court could not obtain a quorum of six justices to hear *Alcoa*. Pursuant to the law then codified at 15 U.S.C. § 29 (now in substantially the same form at 28 U.S.C. § 2109 (1988)), this Court referred that case to a panel of circuit court judges. 148 F.2d at 421. The panel consisted of Learned Hand, Augustus Hand, and Thomas Swan.

[13] *See United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (conduct in part in Mexico by Mexicans could support a Sherman Act claim); *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917) (combi-

In assessing the applicability of the Sherman Act to foreign conduct by a foreign entity, the *Alcoa* court acknowledged that the Sherman Act should be construed to follow the "limitations customarily observed by nations upon the exercise of their powers," namely "those fixed by the 'Conflict of Laws.' " *Id.* at 443. In applying those limitations, the court noted two countervailing principles. While Congress presumably did not intend "to punish all whom its courts can catch, for conduct which has no consequences within the United States," it is also "settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *Id.*

The court set out a two-part test that took account both of the obligation to foreign nations and of the need to protect Americans. First, the plaintiff had to show that the conduct was intended to affect American commerce. *Id.* at 444. Once intent was shown, the burden of proof shifted to the defendant to show that the challenged conduct did not "materially affect" that commerce.[14] *Id.*

This Court has consistently endorsed the principles established in *Alcoa*, and indeed has applied them in contexts ranging beyond the antitrust laws. Seven years after that decision, the Court relied on *Alcoa* to hold that there is no "blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States. Unlawful effects in this country . . . are often decisive." *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 (1952) (Lanham Act case). In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the Court again followed *Alcoa* in finding a Canadian conspirator liable for Sherman Act violations for its actions in Canada. Justice White wrote for a unanimous Court, "A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." *Id.* at 704-05. *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 113 n.8 (1969) (White, J.); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951).

By 1971, when the Court decided *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971), it cited *Alcoa* as stating the "modern principles of the scope of subject matter . . . jurisdiction." Ohio had charged a Canadian concern with dumping pollutants into the Canadian portion of Lake Erie, thereby harming Ohio citizens. The Court noted that if the charges of "acts, albeit beyond Ohio's territorial boundaries, that have produced . . . disastrous effects within Ohio's own domain" proved to be true, Ohio's courts would have "competence to act." *Id.*[15]

Over the past decade, this Court has reaffirmed the holding of *Alcoa*. In *Matsushita Electric Industrial Co. v.*

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nation that was formed in a foreign country but that "affected the foreign commerce of this country and was put into operation here" subject to the Sherman Act); *United States v. Pacific & Arctic Ry. and Navig. Co.*, 228 U.S. 87 (1913) (Canadian participants in a conspiracy to control shipping between Canada and the United States subject to American antitrust laws); *Strassheim v. Daily*, 221 U.S. 280 (1911) (domestic effects sufficient to support subject matter jurisdiction).

[14] The court overturned a finding of the district court that the conduct did not materially affect such commerce. "Thus, it may be concluded that the court's requirement for jurisdiction included a material or substantial effect." 1 W. Fugate, *Foreign Commerce & the Antitrust Laws* § 2.11, at 69 (4th ed. 1991).

[15] As in *Alcoa*, the *Wyandotte* Court found subject matter jurisdiction for conduct that took place entirely outside the United States (polluting Lake Erie from Canada) and engaged in entirely by a foreign national (a Canadian subsidiary of an American company).

Zenith Radio Corp., 475 U.S. 574, 582 (1986), the Court cited *Alcoa* for the proposition that the Sherman Act does not apply to conduct having purely foreign *effects*. It then gave the corollary: "The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce." *Id.* at 582 n.6. By 1990 a unanimous Court could state that any suggestion "that the antitrust laws had no extraterritorial application" has now been "substantially overruled." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 407 (1990).

This Court has thus consistently construed the Sherman Act in a way that takes account of foreign and domestic interests. It has endorsed a jurisdictional requirement of intent and material effects in the United States. Nowhere in Reinsurer Petitioners' 72 pages of briefs do they cite even one of the Supreme Court cases discussed in this section. Instead, the Supreme Court jurisprudence on which the Merrett Petitioners principally rely consists of "three cases involving foreign seamen." Merrett Br. 10.[16]

Stare decisis compels this Court to adhere to its *applicable* case law, as described in this section, rather than to

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[16] In those cases, the Court "deferred to a non-national or international maritime law of impressive maturity and universality." *Lauritzen v. Larsen*, 345 U.S. 571, 581 (1953). Maritime law is *sui generis*. *See* G. Gilmore & C. Black, *The Law of Admiralty* § 1-1 (2d ed. 1975). No comparable body of "non-national or international" law would apply, much less create a conflict, in this case. *See* pp. 26-38, *infra*.

Merrett Petitioners also rely, to no avail, on *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991) ("*Aramco*"). Merrett Br. 13. Among the reasons that *Aramco* is not on point is that the Court was there construing the application of Title VII to foreign conduct *for the first time*. Here, it is construing the Sherman Act *after a long line of its own cases* has held, as Petitioners' *amicus* Canada concedes, Canada Br. 14, that the Act does apply to foreign conduct.

rely on unrelated maritime cases. " '[A]ny departure from the doctrine of stare decisis demands special justification.' " *Patterson*, 491 U.S. at 172 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). While a change in circumstances can sometimes provide such a justification, *see Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting), the circumstances today lead, if anywhere, even more in the direction of an *Alcoa* intent and material effects test. Protecting American consumers was "Congress' foremost concern in passing the antitrust laws." *Pfizer Inc. v. India*, 434 U.S. 308, 314 (1978). To protect those consumers, the United States must be able, in the colorful concession of Petitioner Sturge's Brief, to "defend itself against economic aggressors of another nation who may wish to sharp shoot across national borders and can do so with impunity." Sturge Br. 19-20. Such protection, Petitioner Sturge further concedes, is especially necessary "in a global interdependent economy." *Id.* at 20. An intent and material effects test provides this protection.

B. The States Have Alleged That the Reinsurers Intended to, and Did, Materially Affect American Commerce.

The States have alleged conduct by the Reinsurers that satisfies the standard of intent and material effects. The so-called "London reinsurance claims" allege an Anglo-American scheme to limit American primary insurance coverage, for which the withdrawal of American and English reinsurance support was a means.[17]

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[17] Petitioners frequently refer to the "London reinsurance markets," *e.g.*, Merrett Br. 3, as though those were the subject of the case. The complaints focus not on those markets, but on *the market for insurance risks within the United States*. All of the purchasers in that market are in the United States. Moreover, the "London reinsurance markets" are intimately tied to this

Reinsurer Petitioners suggest that the English conspiracies that formed part of this scheme "are only tangentially related to the core complaint here, namely, the availability of CGL insurance in the United States." Sturge Br. 10-11. This suggestion does not mesh with the suggestion made by the Hartford Petitioners in the connected case, that "[p]rimary insurers and reinsurers are uniquely intertwined and interdependent." Hart. Br. 2. The suggestion also contradicts the teaching of this Court in *Continental Ore* that treating the five counts of the plaintiff's complaint "as if they were five completely separate and unrelated lawsuits . . . was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." 370 U.S. at 698-99. The counts in the complaints here should also be seen as part of a whole.[18]

1. Reinsurers Intended, and Foresaw, that their Conduct Would Affect American Commerce.

Viewed as a whole, or even in Reinsurance Petitioners' disjointed fashion, the complaints easily satisfy this Court's intent and material effects test. For example,

country. "A very large share of the Lloyd's business – more than half overall and as much as two-thirds in certain specialist markets – is sold to the United States." G. Hodgson, *Lloyd's of London: A Reputation at Risk* 9-10 (1984).

[18] The Connecticut-style complaints charge all the defendants, both domestic and foreign, with an overarching conspiracy. Conn. Compt., First Claim for Relief, JA-88-90. Contrary to the contention made by the Reinsurer Petitioners, Merrett Br. 24 n.20, the court below did not affirm the dismissal of that claim. Rather it reversed and remanded with leave for the States to amend in the manner that the States had suggested. A-26-27. Even without this claim, the court below properly treated the conduct here as interconnected. A-16, 21-22.

in the London Market Agreement, the Reinsurers aimed their refusal to provide property pollution reinsurance directly at " '*all U.S.A. . . . exposed insurance/reinsurance business.*' " Conn. Compt. ¶ 112, JA-88 (quoting Agreement) (emphasis added). The intent to affect American commerce in this case is at least as strong as the intent that satisfied the court in *Alcoa*. There, the parties to the agreement extended their production and sales quotas to include imports into the United States. 148 F.2d at 442-43. This "change," the court wrote, "was deliberate and was expressly made to accomplish" an effect on imports. *Id.* at 444. The same could be said of the Reinsurers' conduct. The States allege no intent to affect British commerce.[19]

The district court did not dispute these facts. Instead, it held that the Reinsurers did not intend to harm American commerce because their actions had a "legitimate business purpose." A-77. As the court of appeals noted, the district court had asked the wrong question. The issue was not whether the Reinsurers' conduct was justified; this goes to the merits. *See also* Brief for the United States as *Amicus Curiae* to the Ninth Circuit, at 30 (May, 1990). Rather, the correct question is "was [the conduct] intended to have effects here? The answer in this case must be yes." A-31.[20]

[19] The Merrett Petitioners base their advocacy of a balancing test in large measure on "two generations of Restatements." Merrett Br. 7. Yet the most recent generation would not allow balancing in this case. It recognizes that, in antitrust cases, a principal intent to interfere with American commerce, combined with even minimal effects on that commerce, obviates the need for any balancing test. *Restatement (Third) of the Foreign Relations Law of the United States* § 415 comment a (1987). Both conditions are more than satisfied here.

[20] Moreover, Petitioners' purpose was not legitimate. In a legitimate cooperative enterprise, the enterprise *adds* a product or service of value to the market. *See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) ("*BMI*"). While a

Not only was a material effect on American commerce intended, it was also reasonably foreseeable. The Reinsurers "concede[d]" in the district court that the foreseeability factor weighed against them. A-77. The court of appeals held that, "[a]s intended, the effects were, of course, foreseeable." A-31. This holding is clearly correct. Because the Reinsurers aimed their boycott agreements straight at the heart of the "United States . . . exposed insurance/reinsurance business," they must have foreseen that they might hit their target.

2. Reinsurers' Conduct Had Material Effects in the United States.

The district court's determination that the complaints satisfy the "direct, substantial, and reasonably foreseeable effect" test of the FTAIA, A-69-70, affirmed on appeal, A-27, is dispositive on the issue of substantiality of effects, as it was for the circuit court, A-30. In any event, both courts below held that the effects in the United States of the Reinsurers' conduct outweighed the effects anywhere else in the world. The circuit court wrote, "Accepting as true the plaintiffs' allegations, the actions of the foreign defendants has had the kind of 'real economic consequences' for the American economy that strongly weigh in favor of the exercise of jurisdiction." A-30. The district court held that "the conduct of [the foreign] defendants had a sufficiently significant effect in

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reinsurance treaty might add a service of value, the complaints, contrary to Petitioner Sturge's contentions, Sturge Br. 38, do not challenge those treaties. Rather, the complaints allege agreements to *withdraw* services from the market. Further, in *BMI*, the participants "retain[ed] the rights *individually* to license public performances" of their work. 441 U.S. at 11 (emphasis added). By contrast, the participants in the instant agreement were prohibited from offering the forbidden coverage individually. *See* Conn. Compt. ¶ 99, JA-85.

the United States to make this factor weigh in favor of the exercise of jurisdiction." A-76.

American effects were indeed overwhelming. Earlier this year, this Court unanimously held that the activities of "foreign corporations with no other connections to the United States" could have a "direct effect" in this country. *Argentina v. Weltover, Inc.*, 112 S. Ct. 2160, 2168-69 (1992) (construing Foreign Sovereign Immunities Act). Here, the Reinsurers had many connections with the United States, including Lloyds' writing half of its casualty business on American risks. Proffered Facts ¶ V(D)(3), JA-255. The direct effects of their activities took place here. Reinsurance is an essential input into American primary insurance. Conn. Compt. ¶ 4(p), JA-63. By denying that input, the Reinsurers made occurrence, casualty pollution, and property pollution coverage unavailable in this country, or available only at exorbitant costs. Conn. Compt. ¶¶ 129, 134, 139, JA-94-96.

The court of appeals rightly corrected the district court for not according sufficient weight to its finding that the effects were predominantly American. *Accord*, P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 237' (1992 Supp.) (approving decision of the court of appeals in the instant case because the "only intended effect [of the agreements at issue] would be felt in the United States"). When these effects are coupled with intent, this Court's precedents treat them as dispositive.[21] Even under the interest balancing formulas, such as the approach espoused in the Ninth Circuit's *Timberlane* cases, material effects are dispositive, in practice if not in theory. "A pragmatic assessment of those decisions adopting an interest balancing approach indicates *none where United States jurisdiction was declined* when there was more than a *de minimis* United States interest." *Laker Airways Ltd. v.*

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[21] When they are coupled with foreseeability, *see* p. 20, *supra*, the FTAIA treats them as dispositive. *See* pp. 22-26, *infra*.

Sabena, Belgian World Airlines, 731 F.2d 909, 950-51 (D.C. Cir. 1984) (emphasis in original). *See also* Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is "Reasonableness" the Answer?*, 19 Int'l L. & Pol. 565, 574 (1987). The States have found, and Reinsurer Petitioners have cited, no cases to the contrary.

It is instructive, in this regard, to compare the effects here with those in *Timberlane*. There, the plaintiff wanted to establish itself as a lumber dealer in the Honduran lumber market. *Timberlane II*, 749 F.2d at 1380. A lien foreclosure by defendants prevented this. *Id.* The plaintiff alleged that if it had been able to establish this business, it would have exported lumber to the United States. *Timberlane I*, 549 F.2d at 601. The court held that, during the relevant years, Honduran lumber never constituted more than 11/100 of one percent of total United States lumber consumption. "Clearly," held the court, "Honduran imports have only a miniscule [*sic*] effect on United States lumber markets." *Timberlane II*, 749 F.2d at 1385.

It is impossible to deem the American effects pleaded in the instant case minuscule. The buyers of the reinsurance, the boycott victims (the nonconspiring primaries), and all the consumers are American. The product, reinsurance of *domestic American risks*, is peculiarly American. Also, while the Honduran lumber industry had no significant impact on the American market, Lloyd's is the largest reinsurer of American risks. Proffered Facts ¶ V(D)(4), JA-255. This is an American case, and *stare decisis* requires an American court to assert jurisdiction.

II. THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT REQUIRES AMERICAN COURTS TO EXERCISE JURISDICTION OVER CASES IN WHICH THERE IS A DIRECT, SUBSTANTIAL, AND REASONABLY FORESEEABLE EFFECT ON AMERICAN COMMERCE.

A recent Congressional enactment also compels this Court to assert jurisdiction here. Passed in 1982, the

FTAIA provides that the Sherman Act does not apply to conduct involving commerce with foreign nations, other than import commerce, "unless such conduct has a *direct, substantial, and reasonably foreseeable effect* on trade or commerce which is not trade or commerce with foreign nations" (emphasis added).[22] The Sherman Act therefore does apply to conduct that has a direct, substantial, and reasonably foreseeable effect on non-foreign (i.e., domestic or import) commerce. Both courts below held that the States had alleged the requisite effects, A-69-70, A-27, and the States have demonstrated to this Court that they have alleged these effects. *See* pp. 20-22, *supra*.[23]

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[22] The FTAIA, 15 U.S.C. § 6a (1988), reads:

"Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless –

(1) such conduct has a direct, substantial, and reasonably foreseeable effect –

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title shall apply to such conduct only because of the operation of paragraph 1(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States."

[23] While Reinsurer Petitioners seem to suggest that their conduct is foreign commerce, Merrett Br. 4, in which case the FTAIA would apply by its terms, their *amicus* Canada characterizes their refusing to sell into the United States as "import commerce." Canada Br. 14 n.12. The terms of the FTAIA exclude import commerce, which is thus subject to the *Alcoa* intent and material effects test. Because that test does not differ significantly from the direct, substantial, and reasonably foreseeable effects test of the FTAIA, lead-

Earlier this year, this Court noted, "In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992).[24] Attempting to circumvent this rule, Reinsurer Petitioners rely on a single sentence in the House Report that cites *Timberlane I* and purports to allow courts to employ comity analyses to circumscribe their own jurisdictions. Merrett Br. 21; Sturge Br. 30. Justice Scalia has rightly criticized treating a reference to a small number of lower court cases "in a document issued by a single committee of a single house as the action *of Congress*." *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring in part and concurring in the judgment) (emphasis in original). This Court should give that sentence as little attention as members of Congress probably did. *See id.* ("Members have better uses for their time than poring over [lower] Court opinions."). Instead, it should follow the teachings of *Aramco*, on which Reinsurer Petitioners purport to rely, Merrett Br. 13, and glean "congressional purpose" from "language in the relevant act."[25] 111 S. Ct. at 1230 (citations omitted).

ing commentators have argued that the FTAIA has codified the same standard for imports and exports. P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 236'a (1992 Supp.). In any event, it would be difficult to defend a construction of the statute that allowed *greater* immunity for imports aimed directly into the United States than for foreign conduct that would less directly affect this country.

[24] The same strictures apply to Reinsurer Petitioners' argument that "Congress could not have intended" the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (1988), to permit domestic insurers to engage in certain conduct while prohibiting foreign reinsurers from engaging in the same conduct. Merrett Br. 29-30. "The question, however, is not what Congress 'would have wanted' but what Congress enacted." *Argentina v. Weltover, Inc.*, 112 S. Ct. at 2168. Congress enacted a partial exemption from the Sherman Act for the business of insurance to the extent that it is "regulated by State law." 15 U.S.C. § 1012(b). Congress could thus certainly have intended to exempt certain insurer conduct *that the states regulate* for the benefit of American consumers and businesses, while not exempting reinsurer conduct *that the states do not regulate*.

Even if the House Report were probative, it would not require a comity balancing analysis. After the sentence citing *Timberlane* on which Reinsurer Petitioners rely, the Report continues, "Similarly, the bill is not intended to restrict the application of American laws to extraterritorial conduct where the requisite effects exist." H.R. Rep. No. 686, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News 2487, 2498.

In the recent, unanimous opinion in *Kirkpatrick*, an antitrust case, 493 U.S. at 402, this Court refused an invitation to use "principles of abstention" to "expand[] judicial incapacities" beyond those already set forth *by the courts* in the act of state doctrine. *Id.* at 409. *A fortiori*, it should not expand judicial incapacities beyond those set forth *by Congress* in the FTAIA. This Court should treat that statute as dispositive here and accept the unappealed holdings of both courts below that the complaints satisfy its terms.

Even if this Court does not find the FTAIA to be dispositive, at the least the court of appeals was clearly correct when it stated that "[i]f a complaint survives the new bar of 15 U.S.C. § 6a because the conduct has a 'direct, substantial, and reasonably foreseeable effect' on American commerce, it is only *in an unusual case* that

[25] The district court in this case and leading commentators have also suggested that the plain meaning of the FTAIA, foreclosing any additional judicial interest balancing, overcomes the sentence in the House Report. *See* A-70 n.28; P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 236'a (1992 Supp.); 1 W. Fugate, *Foreign Commerce and the Antitrust Laws* § 2.15, at 105 (4th ed. 1991).

comity will require abstention from the exercise of jurisdiction." A-28 (emphasis added). It is remarkable that Reinsurer Petitioners and their *amici* ridicule this position, in light not only of the plain meaning of the FTAIA, but also of fifty years of Supreme Court case law concerning the need to assert antitrust jurisdiction and *Kirkpatrick*'s statement that abstention should occur only rarely (or "in an unusual case"). *E.g.*, Merrett Br. 19-20, U.K. Br. 23.

Even Professor Kingman Brewster, who "pioneer[ed]" the *Timberlane* balancing test, Merrett Br. 16, wrote that "the significance of the challenged conduct for American commerce should be of *central importance* in assessing the propriety of an exercise of jurisdiction under the balancing standard." 1 J.R. Atwood & K. Brewster, *Antitrust and American Business Abroad* § 6.14, at 167 (2d ed. 1981) (emphasis added). The decision of the court of appeals thus does nothing more than apply the established presumption that the presence of powerful American effects militates strongly against abstention.

III. THIS CASE PRESENTS NO CONFLICT WITH INTERNATIONAL OR FOREIGN LAW.

Disregarding both consistent Supreme Court precedent dating from *Alcoa* and the legislative directives of the FTAIA, the Merrett Brief calls for the creation of a new abstention doctrine. It demands that this Court defer to "principles of international law and comity," in order to avoid "significant conflict with the law and policy of the United Kingdom." Merrett Br. 12, 27.

In so urging this Court, the Merrett brief totally ignores *Kirkpatrick*. Defendants there asked the Court to use "international law" and "international comity" to justify abstention, just as Reinsurer Petitioners do. 493 U.S. at 404-05. This Court firmly rejected this request. It denied that those "policies are a doctrine unto themselves, justifying expansion of . . . unspecified ' . . . principles of abstention' . . . into new and uncharted fields."

Id. at 409. The Court should also reject Reinsurer Petitioners' efforts to expand abstention into a new and uncharted field. As this Court stated, "Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *Id.*

Those efforts are especially unwarranted here. In the first place, international law supports, rather than contradicts, the use of the intent and material effects test. Second, American antitrust law does not conflict with applicable English law.

A. No Principles Drawn from International Law or Comity Are Inconsistent with this Court's Half Century of Precedent.

International law endorses an intent and material effects test. "[T]he usage of the civilized world" holds that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power." *Strassheim v. Daily*, 221 U.S. 280, 284-85 (1911) (Holmes, J.).[26] Thus, as counsel for Petitioner Sturge has written, "most western nations . . . include . . . effects within the territory" as one of the "accepted bases for the exercise of jurisdiction." Fox, *Extraterritoriality*, 19 Int'l L. & Pol. at 583. *Accord*, *Laker*, 731 F.2d 909 at 923.[27]

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[26] Although the case concerned states of the Union, its language shows that it applies internationally.

[27] Those countries include Germany and Austria. Germany: An Act Against Restraints of Competition, § 98(2) ("This Act shall apply to all restraints of competition occurring in the territory of application of this Act, *even if they result from acts done outside such territory.*"; emphasis added), *reprinted in* A-2 D.J. Gijlstra, gen. ed., *Guide to Legislation on Restrictive Business*

The governments of Canada and the United Kingdom appear before this Court as *amici* and contend that an exercise of jurisdiction here would be unwarranted. Yet the Canadian government has advocated just such an exercise. Its Restrictive Trade Practices Commission has argued "that where any overt act which takes place in Canada flows from an agreement which is contrary to the public policy, public interest or public order of Canada, such agreement comes within Canadian jurisdiction even if it was not made in Canada . . . [and] even if the agreement does not violate the law of the country where it was made." Canada, Restrictive Trade Practices Comm'n, *Shipping Conference Arrangements and Practices* 98 (1965). That test would confer jurisdiction on the facts in this case.

Similarly, the courts in England are required to apply a variant of the intent and material effects doctrine to foreign commerce, as a result of the United Kingdom's membership in the European Community.[28] Article 85(1)

Practices, Ger. L.I-36a; Austria: Cartel Act, § 4 ("This Federal Act shall also apply to cartels *concluded abroad but affecting the domestic market*."; emphasis added), *reprinted in id.* at A.L.I-4.

[28] Professor Andreas Lowenfeld, who is listed as "of counsel" on the Merrett Brief, has noted that English courts applying even English *national* law (as opposed to European Community law) have exercised jurisdiction in fraud, blackmail, and products liability cases where the actions took place outside England but the harm was felt inside that country. *See* Fox, *Extraterritoriality*, at 583 n.100 (citing contribution from Professor Lowenfeld). As the District of Columbia Circuit observed in *Laker*, there is no principled distinction between the effects caused by these acts and the "no less tangible . . . harmful effects" caused by antitrust violations. 731 F.2d at 922-23. While the United Kingdom is not required to have logically consistent laws, its own activities suggest that international law does not prohibit taking jurisdiction over "foreign" conduct with domestic effects.

of the Treaty of Rome, JA-294, containing the relevant Community antitrust law, takes precedence over any contrary domestic law of the member states. *Wilhelm v. Bundeskartellamt*, Case 14/68, 1969 E.C.R. 1.[29]

European Community law applies to "enterprises not engaged in business in the Community, on the basis of the effect of restrictive practices within the Community." *Restatement (Third) of the Foreign Relations Law of the United States* § 415 n.9 (1987). In *Imperial Chemical Industries, Ltd. v. Commission*, Case 48/69, 1972 E.C.R. 619 ("*Dyestuffs*"), for example, the European Court of Justice took Article 85(1) subject matter jurisdiction over a foreign parent corporation by treating it and its Community subsidiary as one person, located within the Community. In *A. Åhlström Osakeyhtiö v. Commission*, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, 1988 E.C.R. 5193 ("*Wood Pulp*"), the court held that it had Article 85(1) subject matter jurisdiction over foreign companies, even without subsidiaries in the Community, who sell into the Community, on the theory that such sales place the companies within the Community.[30] This test does not differ substantially from the *Alcoa* intent and material effects

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[29] *See also* European Communities Act, 1972, § 2(1), JA-295 (Community treaties "shall be recognised . . . and be enforced" in Britain); *Garden Cottage Foods v. Milk Mktg. Bd.*, [1983] 2 All E.R. 770 (H.L.) (where applicable, Community law is the law of England).

[30] Advocate General Darmon's opinion in *Wood Pulp* proposed that the Court adopt "the direct, substantial and foreseeable effect" test. 1988 E.C.R. at 5227. "Unless overruled by the Court, the Advocate General's opinion is persuasive authority in national courts." V. Korah, *Competition Law of Britain and the Common Market* § 9.2 (3d rev. ed. 1982). Regardless of what one official of the European Commission may have said in a university lecture, *see* U.K. Br. 21, the Court's opinion in *Wood Pulp* nowhere "overrules" the Advocate General, and his opinion remains "persuasive authority."

test. It would cover the conduct of the Reinsurers, who collectively refused to sell into the United States.[31]

B. This Case Presents No Conflict with Foreign Law.

The Reinsurer Petitioners claim that exercising antitrust jurisdiction here "would result in significant conflict with the law and policy of the United Kingdom." Merrett Br. 22. The United Kingdom would presumably be in the best position to identify that conflict. Yet nowhere in its *amicus* brief does the United Kingdom show that American antitrust law conflicts *in any way* with English substantive law.

The simple fact that the United States and the United Kingdom might legislate in an area does not create a conflict. *See, e.g.*, R. Weintraub, *Commentary on the Conflict of Laws* § 6.2 (1980) (court should identify and eliminate spurious conflicts). When the United States and a foreign country both prohibit the same type of conduct, there is no conflict. Similarly, when the United States prohibits certain conduct, while a foreign country permits it, this Court's antitrust precedents preclude defining that situation as a conflict. *See* pp. 35-36, *infra*. All of the conduct at

[31] Petitioner Sturge relies heavily on *Wood Pulp* in its effort to obtain a separate dismissal. Sturge claims that, in that case, the European Court dismissed a claim against an American export association, KEA, because "while KEA was allegedly a forum for and participant in a cartel directed at Europe, KEA did not *implement* its agreement in the Community." Sturge Br. 21 (emphasis in original). The European Court, however, dismissed the claims against the association solely because the association "played [no] separate role" apart from those of its members, and so added nothing to the case. 1988 E.C.R. at 5245. Thus, Sturge is not the entity analogous to KEA in the instant case. That entity is Lloyd's of London, which the States have not sued.

issue in this case falls into one or both of these two categories.

By contrast, this Court's precedents indicate that a conflict could exist in two circumstances. When the United States prohibits conduct, but a foreign country compels a private party to undertake it ("foreign sovereign compulsion"), a conflict may arise. Also, when the United States prohibits conduct, but a foreign sovereign itself undertakes it ("act of state"), there may be a conflict. In both these circumstances, this Court *may*, although it *need not always*, refrain from taking jurisdiction. Neither of these situations is even arguably presented here.[32]

Kirkpatrick allows this Court to decline jurisdiction only when "a '*principle of decision* binding on federal and state courts alike' " permits it to do so. 493 U.S. at 406 (emphasis in original; citations omitted). The foreign sovereign compulsion and act of state doctrines are such principles. There is no room in this Court's jurisprudence for the creation of the additional "vague doctrine of abstention," *id.*, that the Reinsurer Petitioners urge on this Court.

1. There Is No Conflict Here Because American and English Law Both Prohibit the Conduct at Issue.

There can be no conflict if the laws of both states prohibit the conduct at issue. The applicable American law, of course, is antitrust law. "[W]hile our attachment to the antitrust laws may be stronger than most, many other countries . . . have similar bodies of competition law." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 n.18 (1985). An examination of the two

[32] "That neither of these doctrines even arguably would apply here is further evidence that no significant British interest or other governmental interest would be violated" by asserting jurisdiction. *Laker*, 731 F.2d at 942.

relevant English antitrust laws shows their congruence with American law.

There is no question that English law, both European Community and English national law, would have prohibited the conduct at issue if the targets of Petitioners' actions had been British primary ~~insurers and~~ their customers, rather than Americans. The *"Fire Insurance"* case, *Verband der Sachversicherer e.V. v. Commission*, Case 45/85, 1987 E.C.R. 405, presents facts strikingly similar to those alleged in the instant case. As here, primary insurers conspired, in that case to fix premiums to be charged in Germany. As here, the reinsurers agreed, in a separate but related conspiracy, not to reinsure coverage that did not conform to what the primary insurer conspirators desired, or to do so only at inflated prices. As the States request this Court to do, the European Court treated the reinsurers as part of the scheme that involved the primary insurers. *Id.* at 455. That court found that insurance was subject to Article 85(1),[33] and that the insurers had violated that Article by preventing, restricting, or distorting competition within the Community. *Id.* at 458-59.

In the same scenario, English national law would also prohibit the Reinsurers' conduct. The United Kingdom admits that "[t]he conduct of insurance business is subject to investigation under U.K. competition laws, [including] . . . the Competition Act, 1980." U.K. Br. 11-12.

[33] That article prohibits "concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market." JA-294. Trade between Member States can be affected even if, as here, all the agreeing parties live in one country and the agreement targets victims only in that country. *See Fire Insurance*, 1987 E.C.R. at 458-59 (primary insurer conspirators were German, as were their targets). *See also* United Kingdom, Department of Trade, *Review of Restrictive Trade Practices Policy ("Green Paper")* Annex F, ¶ 11, at 38 (1988).

That Act covers conduct exempted from the Restrictive Trade Practices Act, 1976 ("RTPA"), on which the Reinsurer Petitioners rely. Merrett Br. 25.[34] The Competition Act prohibits conduct that could distort competition connected to the provision of goods or services in the United Kingdom.[35] By limiting the competitive choices available to British reinsurance purchasers, the Reinsurers' conduct would have had the effect of distorting competition within the United Kingdom.

In these examples, the predominant competitive effects occurred in the United Kingdom. In the actual case, those competitive effects occurred overwhelmingly in the United States. That difference cannot be said to create a conflict, however. Using the existence of powerful American effects to deny American jurisdiction would stand this Court's case law on its head.[36]

[34] The Competition Act, 1980, contains only two exemptions, including one for agreements registered under the RTPA. Competition Act § 2(2), JA-291-92. Agreements not registered under the RTPA, because for example of an exemption, are thus not exempt from the Competition Act.

[35] Section 2(1) of the Competition Act, 1980, provides: "[F]or the purposes of this Act, a person engages in an anti-competitive practice if, in the course of business, that person pursues a course of conduct which, of itself or when taken together with a course of conduct pursued by persons associated with him, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in the United Kingdom or any part of it or the supply or securing of services in the United Kingdom or any part of it." JA-291.

[36] In any event, Petitioners' conduct directed at Americans, as alleged in the complaints, does violate English law. *See, e.g., Coöperatieve vereniging "Suiker Unie" UA v. Commission*, Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, 1975 E.C.R. 1663, 2016-20 (conspiracy to restrict exports outside the Community would have sufficient effects within the Community to constitute a violation of Art. 85 (1)).

Perhaps aware that it can show no actual conflict with British law, the United Kingdom takes a remarkable position: "A conflict arises in this case because Respondents ask the U.S. courts to impose substantial liability and restrictions on the British industry which is operating under the British regulatory and competition regime." U.K. Br. 9. The British government would preclude the United States from asserting *any* jurisdiction over a partially regulated British industry, even if, as here, the content of American law did not conflict at all with the content of British law. The Reinsurer Petitioners would also have this Court adopt this extreme rule, which harks back to the days of *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909). Merrett Br. 26-27. The Court then wrote that "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." That conclusion, of course, has now been "substantially overruled." *Kirkpatrick*, 493 U.S. at 407.

The court of appeals erred when it accepted the British government's assertion of a conflict as conclusive. A-29 ("The British Brief reiterates [the district court's] conclusion [that this case 'would lead to a significant conflict with English law and policy']; we do not doubt its accuracy."). As the United States argued below, principles of international comity do not compel such deference. Brief of the United States as *Amicus Curiae* to the Ninth Circuit, at 28.[37]

[37] In *First National City Bank v. Banco Para El Commercio Exterior de Cuba*, 462 U.S. 611, 621-22 (1983), a Foreign Sovereign Immunities Act case, this Court rejected the contention that it had to accept Cuba's *statutory* assertion as to the status of a Cuban corporation. Similarly, it need not accept Britain's assertion *in a brief* that a conflict exists, where Britain has so thoroughly failed to demonstrate a conflict, and where accepting that assertion would allow British reinsurers to violate the rights of Americans with impunity.

2. There Is No Conflict Here Even If English Law Permits the Conduct at Issue.

The United Kingdom indicates that it regulates the "solvency" and "financial stability" of English insurers. U.K. Br. 10-11. Nowhere does it suggest that it permits individual syndicates within Lloyd's to collude to prevent any of those syndicates from offering reinsurance or retrocessional insurance coverage. The United Kingdom certainly does not suggest that such conduct is permitted as part of a scheme to restrict insurance coverage in the United States.

Even if the United Kingdom did permit such conduct, this Court's precedents would not treat that as a conflict. In *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), Mexico "aided" defendants' anticompetitive cartels by enacting "discriminatory legislation." The Court rejected defendants' reliance on this legislation, and found defendants subject to Sherman Act prosecution. *Id.* at 276. In *Continental Ore*, a Canadian company had been appointed the exclusive buying agent of vanadium for the Canadian government. The Canadian company defendant bought this vanadium from its co-defendants, as part of an illegal scheme. The Court rejected the Canadian company's contention that it should be exempted from the Sherman Act because it "was acting in a manner *permitted* by Canadian law." 370 U.S. at 706-07 (emphasis added).

Reinsurer Petitioners and their British *amici* suggest that the United States would be outraged if the roles here were reversed. Merrett Br. 28; Sturge Br. 26; U.K. Br. 14. The roles were reversed in *Wood Pulp*. There, an American Webb-Pomerene association[38] claimed that American

[38] The Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1988), exempts certain activities of properly registered trade associations from the provisions of the Sherman Act.

law, which allowed its activities, conflicted with European Community law, which prohibited them. The European Court rejected that argument, just as this Court did in *Sisal* and *Continental Ore*: *"There is not . . . any contradiction* between the conduct required by the United States and that required by the Community *since the Webb-Pomerene Act* merely exempts the conclusion of export cartels from the application of United States antitrust laws but *does not require such cartels to be concluded."* 1988 E.C.R. at 5244 (emphasis added). Contrary to Reinsurer Petitioners' speculations, "the United States authorities raised no objections regarding any conflict of jurisdiction when consulted by the [European] Commission." *Id. See also* United States, Department of Justice, *Antitrust Enforcement Guidelines for International Operations*, Part I, § 5 (1988) (adopting the same approach as the cases cited); 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 239 (1978).

3. There Is No Conflict Here Because English Law Did Not Compel Reinsurers' Conduct.

Reinsurer Petitioners do not contend that any of their actions were compelled by the British government, and *the United Kingdom amicus specifically disclaims reliance on a compulsion theory*. U.K. Br. 24. Although this Court has never expressly ruled on this issue, a private action that was compelled by a foreign sovereign might avoid at least some antitrust scrutiny. *See Continental Ore*, 370 U.S. at 706-07. Even in such cases, however, this Court has not entirely deferred to foreign compulsion. In *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), a Swiss law (a so-called "blocking statute") prevented the plaintiff from complying with an American court order to produce documents. The Court did not order dismissal of the plaintiff's action, but it did allow the trial court to draw negative inferences against the plaintiff for its failure to comply. *Id.* at 212-13.

Reinsurer Petitioners and the United Kingdom claim that the instant case conflicts with another "blocking statute," the Protection of Trading Interests Act, 1980 ("PTIA"), JA-281-90. Merrett Br. 26; U.K. Br. 3-4. As Justice Stevens has written for the Court, "American courts are not required to adhere blindly to the directives of such a statute." *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 544 n.29 (1987). Moreover, there is no conflict. The PTIA prohibits British courts from helping successful American plaintiffs recover multiple damages from British concerns. PTIA § 5(2)(a), JA-286. The States will not need any such assistance, because Petitioners have sufficient assets in this country to satisfy any judgments that might be awarded. The PTIA also allows British concerns to levy against American assets in the United Kingdom to offset any multiple damages they have paid. *Id.* § 6, JA-287-89. The PTIA does not prohibit British courts from assisting American courts in enforcing antitrust injunctions. The States do not expect to need even that aid, however, because their requests for injunctive relief can be handled entirely by American courts. *See* pp. 40-41, *infra*.

4. There Is No Conflict Here Because the Conduct Was Not That of a Foreign Sovereign.

A true conflict would most likely arise if American law prohibited certain conduct, but a foreign sovereign undertook it anyway. This Court's act of state doctrine avoids that conflict by rendering certain foreign sovereign actions immune from judicial scrutiny. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918).

Even in this area of clearest conflict, however, the Court has unanimously refused to expand the act of state doctrine to cover even conduct just outside the boundaries of that doctrine. *Kirkpatrick*, 493 U.S. at 401 (while the act of state doctrine applies to claims that "rest upon the asserted invalidity of an official act of a foreign sovereign," it will not be extended to claims that "require

imputing to foreign officials an unlawful motivation . . . in the performance of such an official act"). The facts of the instant case, involving as they do purely private acts, look much less like an act of state case than did the facts in *Kirkpatrick*. If this Court took jurisdiction over a case as close to the act of state doctrine as *Kirkpatrick, a fortiori* it should assert jurisdiction in the instant case.[39]

Further, even in act of state cases, a plurality of this Court has refrained from abstaining "where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy." *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (opinion of Rehnquist, J.). A similar representation by the Executive Branch was made to the court below, *see* Brief of the United States as *Amicus Curiae* to the Ninth Circuit, at 25-30, and should certainly preclude this Court from applying a new "vague doctrine of abstention." *Kirkpatrick*, 493 U.S. at 406.

IV. IF THIS COURT DOES DECIDE TO ENGAGE IN A BALANCING TEST, THE REMAINING *TIMBERLANE* FACTORS FAVOR JURISDICTION.

In *Timberlane I*, the Ninth Circuit adopted what it described as a "jurisdictional rule of reason," 549 F.2d at 613, balancing seven factors to determine whether a court

[39] Indeed, not even all actions by foreign sovereigns may be immune from American jurisdiction. *See Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 706 (1976) (opinion of White, J., for four justices on an equally divided Court) (act of state doctrine does not apply to the "purely commercial operations" of foreign sovereigns).

should assert jurisdiction in cases involving foreign elements.[40] Even if the Court chooses to engage in a *Timberlane*-style multi-factor balancing test, it should affirm the holding of the court of appeals that the *Timberlane* factors overwhelmingly support the assertion of jurisdiction here. A-27-31. Four factors have already been discussed: intent to affect American commerce, foreseeability of such effect, relative importance of effects in the United States and elsewhere, and lack of conflict with English law. All strongly favor the assertion of jurisdiction. The remaining three factors, nationality and location of parties, location of conduct, and enforceability, also favor assertion of jurisdiction.

The plaintiff States are, of course, located in the United States and represent 130 million Americans. As *both* courts below correctly noted, " 'many of the corporate defendants,' including those located in England, 'are subsidiaries of American corporations and may be

[40] To satisfy *Timberlane*, plaintiffs must pass through three hurdles. First, they must show "*some* effect – actual or intended – on American foreign commerce." 549 F.2d at 613 (emphasis in original). Second, they must show "a civil *violation* of the antitrust laws." *Id.* (emphasis in original). Finally they must survive a seven-factor balancing test. "The elements to be weighed include [1] the degree of conflict with foreign law or policy, [2] the nationality or allegiance of the parties and the locations or principal places of business of corporations, [3] the extent to which enforcement by either state can be expected to achieve compliance, [4] the relative significance of effects on the United States as compared with those elsewhere, [5] the extent to which there is explicit purpose to harm or affect American commerce, [6] the foreseeability of such effect, and [7] the relative importance to the violations charged of conduct within the United States as compared with conduct abroad." *Id.* at 614.

influenced by the allegiance of their American parents.' " Court of appeals, A-29 (quoting district court, A-75).[41] This Court has treated a parent and subsidiary as one entity for antitrust purposes, *see Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), as, for similar reasons, has the European Court of Justice, *see Dyestuffs*, 1972 E.C.R. at 661-63. There is no reason not to continue to do so in this context.

At least some of the relevant conduct took place in the United States. The States proffered evidence that the London defendants took part in important private meetings and public appearances in the United States. Proffered Facts ¶ V(E), JA-255. Counsel for defendants in the district court conceded that they made various "speeches and pronouncements" in this country. Transcript of Sept. 15, 1989, district court hearing, Docket Entry 866. Beyond this, it is impossible on the current record to determine where all the relevant conduct occurred, because no discovery on the merits has yet been allowed. District Court Pre-Trial Order No. 2, JA-105. This fact counsels against dismissal, as the *Timberlane I* court itself noted: "[D]ismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." 549 F.2d at 603. *See also Pillar Corp. v. Enercon Industries Corp.*, 694 F. Supp. 1353, 1361 (E.D. Wis. 1988).

The court below held that an American court's order of injunctive relief could be enforced and a judgment of money damages collected without the assistance of an English court. A-30. An American court can enforce all

[41] The London Company Market defendants in the applicable counts have foreign parentage. Proffered Facts ¶ V(A)(1), JA-254. They include such well-known "English" names as *Kemper* Reinsurance London, Ltd., and *CNA* Re (U.K.), Ltd. Although Reinsurer Petitioners state that they "have no American parents, subsidiaries or affiliates," Merrett Br. 6 n.7, the London Company Market defendants have joined in their brief, *id.* at 3 n.4, and are properly considered here.

requested injunctive relief against American parents of foreign subsidiaries and American primary insurance defendants.[42] Petitioners' fears that American courts will control the British insurance industry are, thus, unfounded. Finally, as the court of appeals noted, the States can collect any damages entirely "from assets of the foreign defendants within the United States." A-30.[43]

[42] Although Reinsurer Petitioners quarrel with certain features of injunctive relief that the States once requested, Merrett Br. 25-26, the States have since informed both courts below that they do not expect to need any injunctive relief beyond that indicated in the accompanying text. Appellant's Opening Brief to the Ninth Circuit, at 54-55.

[43] The complaints satisfy the requirements of other balancing tests as well. For example, *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979), would include the possible effect on foreign relations as a factor. When, as in the court below, the Executive supports the assertion of jurisdiction, a court should defer to its assessment of the effects on foreign relations.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

DATED this 23d day of December, 1992

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Nos. 91-1111 & 91-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., *et al.*,
Petitioners,
v.
STATE OF CALIFORNIA, *et al.*,
Respondents.

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, *et al.*,
Petitioners,
v.
STATE OF CALIFORNIA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether an agreement among certain primary insurers and certain reinsurers to withhold reinsurance from other primary insurers that refused to adopt more limited terms of coverage constitutes "boycott, coercion, or intimidation" under the McCarran-Ferguson Act?

2. Whether an entity, engaged in the insurance business that is subject to state regulation and therefore is immune from liability under the Sherman Act, loses that immunity when it conspires with other insurance entities that are not subject to state regulation to commit acts that violate the Sherman Act?

3. Whether considerations of international comity preclude a federal court from exercising jurisdiction over Sherman Act claims asserted against foreign defendants that engaged in a concerted boycott and other coercive conduct that restrained primary insurers from providing various types of insurance coverage?

PARTIES TO THE PROCEEDINGS

The respondents concur in the statements under this heading in Brief for Petitioners in No. 91-1111, including statements made pursuant to Rule 29.1 of this Court.

This Brief for Respondents is filed on behalf of the following private party plaintiffs in the district court proceedings, who were appellants in the Ninth Circuit: Ace Check Cashing, Inc.; Acme Corrugated Box Co.; Anastasios Markos, t/a Municipal Exxon; Bay Harbor Park Homeowner's Association; Bensalem Township Authority; Big D Building Supply Corp.; Carlisle Day Care Center, Inc.; Durawood, Inc.; Environmental Aviation Sciences, Inc.; Jerry Grant Chemical Associates, Inc.; Keyboard Communications, Inc.; Carmella M. "Boots" Liberto t/a R.J. Liberto, Inc.; P & J Casting Corp.; and Henry J. Rosenfeld.

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BRIEF FOR RESPONDENTS (PRIVATE PARTY PLAINTIFFS)

OPINIONS

The opinion of the District Court for the Northern District of California is reported as *In re Insurance Antitrust Litigation*, 723 F. Supp. 464 (N.D. Cal. 1989), and is reproduced at pages 33a to 88a in the Petition for a Writ of Certiorari in *Hartford Fire Insurance Co. v. California*, No. 91-1111, and at pages A-32 to A-82 in the Petition for a Writ of Certiorari in *Merrett Underwriting Agency Management Ltd.*, No. 91-1128. References to this opinion in this brief are to the *Federal Supplement* and the *Merrett Underwriting* Petition.

The opinion of the Court of Appeals for the Ninth Circuit is reported as *In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991), and is reproduced at pages 1a to 32a of the *Hartford* Petition and at pages A-1 to A-31 of the *Merrett Underwriting* Petition. References to this opinion in this brief are to the *Federal Reporter* and to the *Merrett Underwriting* Petition.

The respondents otherwise concur in the statements under this heading in Brief for Petitioners in No. 91-1111.

JURISDICTION

The respondents concur in the statements under this heading in Brief for Petitioners in No. 91-1111.

STATUTORY PROVISIONS

The relevant statutory provisions are as follows, with the pertinent text set forth in the margin: section 1 of the Sherman Act,[1] section 2 of the Sherman Act,[2] section

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[1] 15 U.S.C. § 1, which provides in pertinent part, "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

[2] 15 U.S.C. § 2, which provides in pertinent part, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the

2(b) of the McCarran-Ferguson Act,[3] and section 3(b) of the McCarran-Ferguson Act.[4]

STATEMENT OF THE CASE

These cases are before this Court in the pleading stage. In the two cases before this Court, the petitioners were the defendants below and the respondents were the plaintiffs. The district court granted motions to dismiss for failure to state a claim. The court of appeals reversed. Rehearing *en banc* was denied. These complaints "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Respondents herein are private parties-plaintiff below.[5] These are private actions alleging violations of section 1 of the Sherman Act and involving commercial general liability ("CGL") insurance. The Statement of Facts is limited to the three issues for which the Court granted *certiorari*:

(a) whether the conduct alleged constitutes a boycott, coercion, or intimidation under section 3(b) of the McCarran-Ferguson Act;

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trade or commerce among the several States, or with foreign nations, shall be deemed guility of a misdemeanor . . . ."

[3] 15 U.S.C. § 1012(b), which provides in pertinent part, "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . *Provided*, . . . the Act of July 2, 1890, as amended, known as the Sherman Act, . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

[4] 15 U.S.C. § 1013(b), which provides in pertinent part, "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

[5] The States' Attorneys General have commenced their suits under the *parens patriae* statute, 15 U.S.C. § 15c(a)(1), on behalf of natural persons. The private plaintiffs, as business entities, have commenced suits as class action on behalf of similarly situated business entities, none of which are within the *parens patriae* statute.

(b) whether domestic insurers forfeit McCarran-Ferguson Act immunity when they conspire with non-state regulated reinsurance companies; and

(c) whether foreign reinsurance companies are subject to the jurisdiction of our federal courts.

Defendants (petitioners herein) are four major primary insurance companies, certain domestic and certain foreign reinsurers, certain domestic and foreign reinsurance brokerage firms, and certain domestic and foreign retrocessional insurance companies. Also named as defendants are two insurance associations—the Reinsurance Association of America ("RAA") and the Insurance Services Office ("ISO").

A. Factual Background and Allegations in the Complaint.

The Complaint[6] alleges that certain primary insurers were dissatisfied with the then existing CGL insurance coverage offered by ISO. These defendants desired to reduce the scope of coverage available. Unable to convince ISO or its membership to adopt their suggestions, these four primary insurers enlisted the aid of both domestic and foreign reinsurers to coerce the ISO membership to accept those restrictions of coverage. The reinsurers then jointly refused to reinsure any CGL coverage other than that demanded by the four primary insurer defendants. As a result, ISO members were forced to capitulate and accept the coverage limitations desired by the four primary insurer defendants. Thus, by enlisting the economic muscle of the reinsurers, of the reinsurance brokers, and of the RAA, the four primary insurer defendants were able to coerce other primary insurers to forgo issuing the coverage other ISO members wanted and to adopt and support the more limited coverage desired by the four primary insurer defendants. This restrained competition and the competitive market that would otherwise

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[6] A Complaint used as a representative model by both courts below was the Complaint of the State of California. Thus, all references to the "Complaint" will be to the Complaint of the State of California (Joint Appendix at 5-56) (hereinafter "J.A.").

determine whether the insurance-consuming public preferred primary insurers who offer one kind of coverage to those who chose to offer more limited coverage.

Specifically, the Complaint alleges the following: The four primary insurer defendants—Hartford, Allstate, CIGNA and Aetna—offer CGL coverage throughout the United States. All are members of ISO, a trade association of approximately 1,400 property and casualty insurers in the United States. (Cal. Compl. ¶¶ 38, 47, J.A. 19, 20.) Among other things, ISO develops policy forms providing for terms and conditions of standard CGL coverage and files and processes them with the insurance commissions of the various states in order to gain their approval. (Cal. Compl. ¶¶ 38, 39, J.A. 19.)

In 1977, ISO began to revise its existing CGL policy forms, which provided occurrence coverage.[7] (Cal. Compl. ¶ 20, J.A. 22.) These revisions resulted in two kinds of policies, rather than one, being filed for approval with state insurance commissions. One provided for the traditional occurrence coverage. The other was new and provided claims-made coverage that significantly limited the coverage provided by the occurrence policy.[8]

Hartford opposed ISO's two new policies because of their terms and conditions of coverage on the following grounds: (a) occurrence coverage should be eliminated and replaced by claims-made coverage; (b) claims-made coverage should include a retroactive date provision[9]; (c) pollution coverage should be totally excluded; and (d) payment of defense costs should be limited by

[7] Occurrence coverage covers losses, whenever claimed, that occur during the policy period. (Cal. Compl. ¶ 4(b), J.A. 8.) *See also St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 535 (1978).

[8] Claims-made coverage covers only those losses for which claims are made while the policy is in effect. (Cal. Compl. ¶ 4(c), J.A. 8.) *See also Barry*, 438 U.S. at 535.

[9] A retroactive date provision in claims-made coverage excludes coverage for claims arising out of occurrences prior to the retroactive date. (Cal. Compl. ¶ 4(e), J.A. 8.)

including defense costs within the policy limits. (Cal. Compl. ¶ 61, J.A. 24.) Hartford's opposition was *rejected* by the ISO membership. Accordingly, policies providing for both kinds of coverage, each containing the terms objectionable to Hartford, were filed with state regulators in March of 1984 and thereafter approved in most states.[10]

Unable to convince the ISO membership to adopt the Hartford positions, Hartford and the other primary insurer defendants enlisted the aid of both domestic and foreign reinsurance companies, also defendants herein, to pressure the ISO membership to accept these changes. Primary CGL insurers require that reinsurance be available to them in order to carry on their business. (Cal. Compl. ¶¶ 34, 83, J.A. 18, 29.)

As a direct result of the communications and meetings among the primary insurer defendants and certain domestic reinsurers, the reinsurers announced to the ISO membership and to the public that the reinsurers would not provide reinsurance for coverage provided under the terms and conditions of the 1984 ISO CGL insurance policies. (Cal. Compl. ¶¶ 66-67, J.A. 25.)

The primary insurer defendants also enlisted foreign reinsurers into their quest to have the ISO membership change the 1984 CGL policies because of the types of coverage provided therein. As a result of communications by the primary insurer defendants with Key Lloyd's of London Syndicates (also defendants herein), the latter threatened to refuse to provide CGL reinsurance in the

[10] The following states approved both ISO policies: Alabama, Alaska, Arizona, Connecticut, Florida, Illinois, Louisiana, Maryland, Michigan, Minnesota, Montana, Ohio, Pennsylvania, Washington, West Virginia, and Wisconsin. Massachusetts and New Jersey disapproved the proposed policy changes. New York approved only the occurrence form. California and Colorado do not require the terms of insurance coverage to be approved. *See In re Insurance Antitrust Litig.*, 723 F. Supp. 464, 469 (N.D. Cal. 1989) (Brief for Petitioners No. 91-1128 at A36-37) (hereinafter "A——").

United States unless four demands were met—the same demands that Hartford originally had made to ISO: (a) the elimination of any CGL policy with occurrence coverage; (b) the addition of a retroactive date to claims-made coverage; (c) exclusion of any pollution coverage from any CGL policy; and (d) the inclusion of defense costs within coverage limits. (Cal. Compl. ¶¶ 69-74, J.A. 25-26.) As a result of these threats, the ISO staff reversed its prior position and accepted Hartford's position on retroactive date and pollution exclusions. Thereafter, the primary insurer defendants made an unprecedented demand that representatives of the domestic and foreign reinsurers be invited to address the ISO Executive Committee in New York. (Cal. Compl. ¶¶ 78-82, J.A. 27-29.) At that meeting, the domestic and foreign reinsurers announced that, without changes in the terms and conditions of coverage in CGL policies, they would refuse to reinsure. (Cal. Compl. ¶ 83, J.A. 29.) As a result of the forgoing, the ISO Executive Committee capitulated to most of the demands. It withdrew the 1984 standard policies for CGL coverage and substituted a new standard policy that included almost all of the coverage restrictions insisted upon by the primary insurer defendants and reinsurers. (Cal. Compl. ¶ 84, J.A. 29.)

However, ISO did not do away with occurrence coverage. As part of their conspiracy with the primary insurer defendants, the foreign reinsurers continued to refuse to sell reinsurance for occurrence coverage risks and threatened to revise the reinsurance treaties to include a "Sunset" clause.[11] (Cal. Compl. ¶¶ 87-91, J.A. 30-31.)

[11] A "Sunset" clause in a reinsurance treaty limits the reinsurance coverage of a primary CGL reinsurer on the basis of time. (Cal. Compl. ¶ 4(w), J.A. 11.) Thus, a primary insurer writing occurrence coverage could not obtain reinsurance co-extensive with the scope of the risks it was insuring. This was intended to force primary insurers to stop offering occurrence coverage. (Cal. Compl. ¶ 91, J.A. 31.)

As a result of these pressures from the domestic and foreign reinsurers in compelling ISO to change its terms of claims-made coverage in its policy and to eliminate its occurrence coverage, ISO in fact revised and filed new CGL policies (a revised occurrence policy with new terms and conditions and revised terms and conditions for claims-made coverage). (Cal. Compl. ¶ 98, J.A. 33.) In addition, ISO withdrew all of its support services[12] for the 1973 ISO policy for occurrence coverage (which was still on file as approved in all states). Without these vital ISO support services, it was virtually impossible for any primary insurer to offer occurrence-based CGL coverage. (Cal. Compl. ¶ 99, J.A. 33.)

All of these actions were taken in furtherance of the conspiracy as alleged in the Complaint, to coerce American primary insurers, that were unwilling to do so voluntarily, to acquiesce to the demands of the primary insurer defendants and to stop offering certain terms and conditions of CGL coverage in the American primary insurance market. Consequently, primary CGL insurers were restrained from competing against Hartford, CIGNA, Allstate and/or Aetna by being unable to offer the insuring public occurrence, pollution, and excess or umbrella coverage or payment of defense costs in addition to liability coverage, as well as being unable to provide terms of claims-made coverage.

B. Decisions of the Courts Below.

1. *The District Court for the Northern District of California.*

In considering whether plaintiffs' allegations fell within the section 3(b) exception to the antitrust immunity under section 2 of the McCarran-Ferguson Act, 15 U.S.C. §§ 1012, 1013(b), the district court found that the alleged conduct involved the business of insurance and was sub-

[12] As part of its services, ISO had collected, aggregated and interpreted data on the 1973 CGL coverage standard relating to loss history, costs, and other insurance performance categories. This information is used to project future loss trends and to calculate rates. (Cal. Compl. ¶¶ 42-44, J.A. 20.)

ject to state regulation. The district court then concluded that "plaintiffs' statement does not allege a boycott. Nor does it (or the Complaints) describe conduct that 'accords with the common understanding of a boycott.'" *In re Insurance Antitrust Litig.*, 723 F. Supp. 464, 475 (N.D. Cal. 1989) (A-49). In reaching its conclusion, the district court relied principally upon this Court's opinion in *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978). *See Insurance*, 723 F. Supp. at 475-7 (A-49-50).

Specifically, the district court concluded that *Barry* required a complete, not a conditional, boycott. The district court relied upon the language in *Barry* that the defendants "are alleged to have agreed that three out of the four *would not deal on any terms with the policyholders* of the fourth." *Insurance*, 723 F. Supp. at 475-76 (A-49) (quoting *Barry*, 438 U.S. at 552) (emphasis added by district court). Among the authorities relied upon were a series of court of appeals and district court opinions that held that no boycott existed where the refusal to deal was conditioned either on adoption of a rate regulation scheme or upon certain terms.[13] *See id.* at 477 (A-51-52).

The district court found "'two reasons for supposing that the Supreme Court [in *Barry*] did not intend to go [so] far'" as to hold agreements to offer insurance only on specific terms as a boycott under the McCarran-Ferguson Act. *Id.* (A-52) (quoting P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶ 210.2, at 107-09 (Supp. 1988)). First, it felt such a holding is "'inconsistent with the statute'" in that it "'would eviscerate the immunity for horizontal agreements on the business of insurance.'" *Id.* (A-52) (quoting P. Areeda & H. Hovenkamp, *supra*). Second, *Barry* "'did not involve an agreement to adopt similar terms.'" *Id.* A-52 (quoting P. Areeda & H. Hovenkamp, *supra*).

[13] These opinions are *Meicler v. Aetna Cas. & Sur. Co.*, 506 F.2d 732, 734 (5th Cir. 1975); *UNR Indus., Inc. v. Continental Ins. Co.*, 607 F. Supp. 855, 862-63 (N.D. Ill. 1984); *Grant v. Erie Ins. Exch.*, 542 F. Supp. 457, 464-66 (M.D. Pa. 1982), *aff'd mem.*, 716 F.2d 890 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983).

The district court found that "plaintiffs here charge no more than an agreement to restrict coverage." *Id.* at 476 (A-50). It distinguished the finding of a boycott in *Barry* in the following way:

> The decision in *Barry*, however, turned not on the pressure and compulsion directed at policy holders [sic] to submit to curtailed coverage, but on the agreement with competitors not to deal with those policy holders [sic] on any terms.

Id. (A-50).

The district court found that the McCarran-Ferguson Act protected the primary insurer defendants from the risk of antitrust liability in the collective process of developing coverage. *See id.* at 478 (A-54). The court believed that the use by some of economic pressures to bring about agreement in the collective development process would not fall outside that immunity. *See id.* (A-54).

> It is also implicit that joint action comprehends efforts to seek agreement by others, including those who might be unwilling to agree were it not for economic exigencies, and again it makes no sense to assert that such efforts constitute non-immune coercion.

Id. at 476 (A-54). The district court viewed the conduct alleged in the Complaint to be nothing more than "horizontal agreements relating to the terms on which the participants were willing to write insurance and reinsurance." *Id.* at 477 (A-52).

Based on its analysis of the allegations of the Complaint, the district court concluded there was no set of facts from which plaintiffs could plead a boycott or coercion. Accordingly, all Complaints were dismissed without leave to amend.[14]

[14] The district court, in the alternative, also granted summary judgment based upon defendants' submissions outside the pleadings. *See id.* at 491 (A-79). However, those submissions are not relevant to the issues before this Court relating to the McCarran-Ferguson Act.

The district court, in a footnote and without explanation, rejected the argument that the McCarran-Ferguson Act exception is lost as a result of joint action with a non-exempt entity. *See id.* at 474 n.13 (A-46 n.13). It relied upon a similar footnote in *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1288 n.12 (9th Cir.), *cert. denied*, 464 U.S. 882 (1983).[15] With respect to foreign reinsurers, the district court reasoned that if the dismissal against them were based upon grounds of comity, the issue need not be reached. On the other hand, it reasoned, if comity permits the exercise of jurisdiction, this would be because the American regulatory laws apply to the foreign reinsurers and thus the McCarran-Ferguson Act would apply as well. *See Insurance*, 723 F.2d at 479.

The district court dismissed the claims brought solely against certain London-based defendants (Claims 5, 6 and 8; *Complaint* ¶¶ 131-140; 146-150, JA 43-46; 47-49) for lack of subject matter jurisdiction. The district court found that its jurisdiction over these claims was precluded by international comity. The district court considered the factors in the Ninth Circuit's *Timberlane* test and concluded that factors arguing against jurisdiction, particularly the avoidance of conflict with the laws of other nations, outweighed those favoring jurisdiction here.

2. *The Court of Appeals for the Ninth Circuit.*

As did the district court, the Court of Appeals for the Ninth Circuit found that the claims involved the business of insurance. *See In re Insurance Antitrust Litig.*, 938 F.2d 919, 927 (9th Cir. 1991) (A-18-19). It found that the primary insurers were subject to state regulation. *See id.* at 927-28 (A-19-21). However, it found that

[15] The court of appeals in *Klamath* held this argument to be "frivolous" and reasoned "[w]ere that the case, every insurer with a [non-exempt] provider arrangement (as in *Royal Drug*) or consultive relationship with third parties (as in *Perino*) would forfeit all of its exemption from the antitrust laws." *Klamath*, 701 F.2d at 1288 n.12.

the foreign reinsurers and their contracts were not subject to state regulation and "[c]onsequently, McCarran-Ferguson Act immunity does not attach to the foreign defendants." *Id.* at 928 (A-20). The court of appeals further concluded that the domestic reinsurer defendants, acting in concert with the foreign insurers, lost their immunity under the McCarran-Ferguson Act, since that conduct was not subject to state regulation. *See id.* (A-20-21).

The Ninth Circuit reversed the district court on the issue of whether a boycott, coercion, or intimidation or the threat thereof was alleged in the complaints. It interpreted the allegations of the complaints in an entirely different manner from the district court. Rather than concluding that all that was alleged was a horizontal agreement to fix the terms of coverage, the court found that the complaints alleged a vertical agreement among the primary insurer defendants, the domestic reinsurers and the foreign reinsurers to boycott CGL primary insurers using the ISO forms:

> Led by Hartford, the defendant primary insurers exerted concerted pressure on ISO to get it to withdraw its form for CGL insurance. In June 1984 Hartford persuaded major American reinsurers to agree to boycott the ISO form. Hartford, Aetna, Allstate and CIGNA then joined forces to persuade key underwriters at Lloyd's to agree to boycott the form. The defendants used reinsurance brokers to convey their message. Leading underwriters in London responded to the American request by threatening a boycott of insurance written on the form.

Id. at 923 (A-11); *see also id.* at 930 (A-24). The court agreed that if all that defendants did was agree to the terms on which insurance would be offered, immunity would exist. *See id.* at 928-29 (A-21). But the court of appeals held that the complaint alleged an agreement to boycott non-conforming primary insurers. *See id.* at 930 (A-23-24). In support, it recited the allegations from the complaint on which it relied to reach its conclusion. *See id.* at 929 (A-21-22). The court of appeals posited "[w]hy were the charges of the Complaint not as plain

to the district court as they appear to be on appeal?" *Id.* at 930 (A-24). Unlike the district court, the court of appeals held that when primary insurers are persuaded by "economic exigencies" to agree to certain terms of coverage, and where those "'economic exigencies' are produced by conspirators who refuse to supply reinsurance if the unwilling insurer does not agree, a boycott is in effect and is being implemented." *Id.* at 930 (A-24) (quoting the district court).

The court of appeals did not read *Barry* to require a refusal to deal "on any terms" in order to constitute a boycott. *See id.* at 930 (A-23-24). It recognized that *Barry* involved a boycott directed at policyholders, while the case *sub judice* alleges a boycott against recalcitrant primary insurers. *See id.* (A-23-24). The court reasoned that "[t]he evil fo a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms." *Id.* (A-23). The court of appeals equated the combined use of defendants' economic power in *Barry* "to force doctors to accept St. Paul's terms" with the reinsurers' combined use of economic power "to force ISO and its recalcitrant members to accept the terms Hartford and its allies wanted." *Id.* (A-23-24).

The Ninth Circuit reversed the district court's holding that international comity precluded the exercise of its jurisdiction over those claims asserted against the London-based defendants. The Ninth Circuit applied the balancing test it developed in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976). While it agreed with the district court that assertion of jurisdiction here would "'lead to significant conflict with English law and policy,'" *id.* at 933 (A-29) (quoting the district court),[16] it found that other factors, particularly the direct effects on American markets, outweighed this concern. It held that jurisdiction ought to be asserted by the district court in this case.

[16] Plaintiffs do not agree with this conclusion. *See, infra,* Section III.c.2.

This Court has granted certiorari on only three of the issues decided by the court of appeals:

(a) whether the conduct alleged constitutes a boycott, coercion, or intimidation under section 3(b) of the McCarran-Ferguson Act;

(b) whether domestic insurers forfeit McCarran-Ferguson Act immunity when they conspire with non-state regulated reinsurance companies; and

(c) whether foreign reinsurance companies are subject to the jurisdiction of our federal courts.

SUMMARY OF ARGUMENT

The primary insurer conspirators enlisted the aid of reinsurers who, by jointly agreeing to refuse to reinsure the type of insurance coverage that the conspirators sought to eliminate, coerced recalcitrant primary insurers into eliminating those types of insurance coverage as well. There were boycotts in both the reinsurance and primary insurance markets, both of which are outside the immunity granted by the McCarran-Ferguson Act.

The joint refusal to deal by reinsurers involved the precise boycott condemned in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), the use of a refusal to reinsure in order to coerce participation in a conspiracy by recalcitrant primary insurers.

St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531 (1978), stressed that the boycott exception to McCarran-Ferguson immunity "is broad and unqualified; it covers 'any' act or agreement amounting to a 'boycott, coercion or intimidation,'" 438 U.S. at 550, and even the dissent expressly recognized that the boycott provision of section 3(b) encompassed "the kinds of antitrust violations alleged in *South-Eastern Underwriters.*" 438 U.S. at 565. The petitioners in *Barry*, several of whom are petitioners in this case, argued that the only circumstance to which the boycott exception applied was to "coercive measures adopted by the conspirators to force other insurance companies and their agents into the conspiracy

or out of the business." Brief for Petitioners in *Barry* at 29. They correctly argued that "[t]he legislative debates show that in enacting the boycott exception Congress was concerned with blacklists and similar punitive measures used by members of an industry to compel other traders to conform their competitive practices to those dictated by the conspiracy . . . ." *Id.* This is the precise circumstance described by Senator O'Mahoney, a member of the Committee that drafted the boycott exception to which the boycott provision of the McCarran-Ferguson Act was to apply. *See* 91 *Cong. Rec.* S1480 (1945). It is the precise situation here.

These agreements on terms and conditions are alleged not to be voluntary among the insurers but rather to be the product of refusals to deal. Since McCarran-Ferguson Act immunity was intended to reach only "cooperative" efforts, *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979), agreements reached among insurers as a result of refusals to deal should not fall within the scope of that immunity, particularly where the effect is to restrain competition among the insurers.

Petitioners argue that because their boycott was not absolute, it falls outside section 3(b). However, in their treatise, Areeda and Hovenkamp quote with approval the Ninth Circuit's rejection of this argument: "The evil of a boycott is not its absolute character but the use of economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms." P. Areeda & H. Hovenkamp, *Antitrust Law* § 210.2 (Supp. 1992). Not only is there no precedent for petitioners' argument, but it runs counter to the many precedents of this Court prohibiting less than absolute boycotts. *See, e.g., South-Eastern Underwriters, supra*; *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941).

The insurance industry has long recognized that neither the relevant activities of domestic reinsurers nor of foreign reinsurers are regulated by state law and conse-

quently are not immune under the McCarran-Ferguson Act. Because "an exempt authority forfeits antitrust exemptions by acting in concert with non-exempt parties," *Royal Drug*, 440 U.S. at 231, the insurers lost their immunity by enlisting the aid of the unregulated foreign reinsurers in their conspiracy.

This basic antitrust doctrine applies with particular force to the McCarran-Ferguson exemption because that Act creates a scheme of complementary regulation under state and federal law under which immunity from federal law exists only where there is state regulation. States cannot and do not regulate the domestic and foreign reinsurers' conduct at issue in this case. *See FTC v. Travelers Health Ass'n*, 362 U.S. 293, 298-99 (1960); *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 456 (1962); J. Atwood & K. Brewster, *Antitrust and American Business Abroad* 78 (2d ed. 1981). Were petitioners' arguments accepted, there would be an unacceptable gap in which activities of the insurance industry would escape both federal and state regulation. Before the present case, both primary insurers and reinsurers urged these principles in seeking to maintain a market for reinsurance unfettered by state regulation. Both fully recognized the consequent absence of the McCarran-Ferguson immunity.

In the present case, state regulators were unable to reach the reinsurance boycott. They were restricted to accepting or to rejecting the policies with limited coverage offered by primary insurers as a result of the boycott without the ability to remedy the boycott itself. Absent the boycott, the state regulators would have had a variety of alternative coverages submitted to them for approval by the primary insurers that were ultimately coerced into joining the conspiracy. Moreover, the boycott by reinsurers effectively precluded recalcitrant primary insurers from offering the boycotted coverage even when approved by state regulators.

Royal Drug Co., 440 U.S. at 231, held that where an otherwise immune entity that was engaged in the busi-

ness of insurance conspired with an entity that was not engaged in the business of insurance, the otherwise immune entity lost its immunity. Otherwise McCarran-Ferguson Act immunity would have extended to non-immune entities, violating the principle that immunities are to be construed narrowly rather than broadly. *See id.* Here, likewise, petitioners seek to extend the immunity, in this case, to entities and conduct not regulated by state law. The logic and holding of *Royal Drug* apply with equal if not greater force.

In the global insurance and reinsurance market, United States federal courts must assert jurisdiction over conduce that involves a conspiracy among American and foreign defendants whose purpose and effect, as the plaintiffs allege, is to disrupt the American insurance market. When Congress has selected the regulation it finds appropriate for American markets, United States courts must exercise their jurisdiction in efforts to enforce Congress's policies. The decision of the Ninth Circuit should be affirmed. The London defendants' contrary argument that the avoidance of conflict with other nations' laws should be the primary consideration in a comity analysis is without support in case law, scholarly commentary, or policy.

ARGUMENT

I. AN AGREEMENT AMONG CERTAIN PRIMARY INSURERS AND CERTAIN REINSURERS TO WITHHOLD REINSURANCE FROM OTHER PRIMARY INSURERS THAT REFUSED TO ADOPT MORE LIMITED TERMS OF COVERAGE CONSTITUTES "BOYCOTT, COERCION, OR INTIMIDATION" UNDER THE McCARRAN-FERGUSON ACT.

A. The Boycott, Coercion, and Intimidation Restrained Competition.

The issue of boycott, coercion, and intimidation falls in a setting in these cases where competition in issuance of primary insurance was restrained. As of 1984, at which time defendants' concerted actions began, there were two kinds of CGL insurance coverage approved by

state insurance commissions throughout the United States: occurrence coverage and claims-made coverage. Although claims-made coverage may have been satisfactory for some policyholders, it failed to meet the needs of other policyholders. For example, with the elimination of occurrence coverage, a manufacturer or other business entity that ceased operations would be unprotected from any legal liability arising out of its prior conduct unless it continued to purchase claims-made insurance after it ceased operations and at the time the claim was made.

Before defendants began their coercive conduct, there were primary insurers who desired to compete in the CGL market by offering occurrence coverage. Because of the differences in the coverage offered, those primary insurers who desired to offer only claims-made coverage faced competition from the sellers of occurrence coverage.[17] The defendants' coercive conduct restrained competition from the sellers of occurrence policies.[18]

B. A Conspiracy to Refuse to Offer Reinsurance to Primary Insurers Unless They Agree to Limit Primary Insurance Coverage Constitutes Boycott, Coercion, or Intimidation Under the Antitrust Laws and Therefore under the McCarran-Ferguson Act.

The district court concluded that because the ultimate agreement reached among ISO members involved terms and conditions of coverage, that agreement was the type accorded antitrust immunity under the McCarran-Ferguson Act. The district court apparently found it irrelevant whether that ultimate agreement to limit the

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[17] We are using the "occurrence vs. claims made" dichotomy as an example here, but the same consequences apply to the other coverage limitations relating to "pollution" and "defense costs."

[18] It should be noted that not one state has approved providing for claims-made CGL coverage as the only approved coverage. Rather, those states that have approved claims-made coverage have also approved the occurrence coverage. Thus, no state has sanctioned the claims-made coverage as the only coverage available. Conversely, New York has approved only occurrence coverage while disapproving the claims-made coverage.

terms and conditions of coverage to policyholders was achieved voluntarily or was achieved involuntarily due to a concerted refusal to offer reinsurance to uncooperative primary insurers. The cases relied upon by the district court to support this proposition, however, all involve voluntary agreements in the insurance industry. *See, supra,* n.13.

The court of appeals concluded differently, holding that the coercion exerted by the defendants through a concerted refusal to deal was the very conduct which the McCarran-Ferguson Act intended to keep within the ambit of antitrust scrutiny. The history of that Act and this Court's decision in *Barry,* 438 U.S. 531 (1978), clearly support the conclusion of the court of appeals.

As this Court recognized in *Barry,* "[t]he McCarran-Ferguson Act was passed in reaction to this Court's decision in *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944)." *Barry,* 438 U.S. at 538 (parallel citations omitted). The indictment in *South-Eastern Underwriters Ass'n* ("*S.E.U.A.*") alleged, *inter alia,* "boycotts together with other types of coercion and intimidation to force non-[S.E.U.A.] member insurance companies into the conspiracies . . . ." *S.E.A.U.,* 322 U.S. at 535. The "boycott and other types of coercion" included the non-members being "cut off from the opportunity to reinsure their risks . . . ." *Id.* One aspect of the conspiracy in which the non-members were forced to join was "fixing and maintaining arbitrary and noncompetitive premium rates on fire and specified 'allied lines' of insurance . . . ." *Id.* at 534. Thus, the Court in *S.E.A.U.* found that the use of coercion to reach involuntary agreement among insurers to fix the rates of insurance constituted a boycott.[19]

[19] In *S.E.U.A.,* the Court found that the defendants' conduct violated the antitrust laws:

> The kind of interference with the free play of competitive forces with which the appellees are charged is exactly the type of conduct which the Sherman Act has outlawed for American "trade or commerce" among the states.

S.E.U.A., **322 U.S. at 536.**

Nothing in the legislative history of the McCarran-Ferguson Act indicates that the use of boycott, coercion, or intimidation to compel insurers to agree to rates, terms, or conditions of coverage is protected from antitrust scrutiny. *Barry* indicates the contrary:

> The language of § 3(b) is broad and unqualified; it covers "any" act or agreement amounting to a "boycott, coercion, or intimidation." Congress had intended to limit its scope to boycotts of competing insurance companies or agents, and to preclude all Sherman Act protection for policyholders, it is not unreasonable to assume that it would have made this explicit. While the legislative history does not point unambiguously to the answer, it provides no substantial support for limiting language that Congress itself chose not to limit.

Barry, 438 U.S. at 550 (footnote omitted). Indeed, petitioners failed to cite any legislative history[20] suggesting that an involuntary agreement relating to rates or terms of coverage which results from a "boycott, coercion, or intimidation" is protected from antitrust scrutiny regardless of its subject matter.[21]

[20] In fact, seven of petitioners' nine references to Congressional debates are from the debates regarding the Walters-Hancock Bill of 1943, a predecessor of the McCarran-Ferguson Act that totally exempted the insurance industry from antitrust scrutiny, which died in 1944 after a procedural vote in the Senate, with the close of the 78th Congress. *See* Brief for Petitioners in No. 91-1111 at viii-ix. The McCarran-Ferguson Act was subsequently introduced in the 79th Congress. *See generally* C.D. Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy,* [1978] Duke L.J. 587.

[21] In enacting the McCarran Act, "Congress did not intend to and did not overrule the *South-Eastern Underwriters* case." *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 220 (1979). The dissent in *Barry* expressly recognized that the boycott provision encompassed "the kinds of antitrust violations alleged in *South-Eastern Underwriters*—that is, attempts by members of the insurance business to force other members to follow the industry's private rules and practices." *Barry,* 438 U.S. at 565 (Stewart, J., dissenting).

The exemption afforded insurance companies under the McCarran-Ferguson Act was aimed at protecting "cooperative" efforts, such as rate-making. In *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), this Court, after reviewing the legislative history, concluded:

> Because of the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry *cooperation*, the primary concern of both representatives of the insurance industry and the Congress was that *cooperative* rate-making efforts be exempt from the antitrust laws.

Royal Drug, 440 U.S. at 221 (emphasis added); *see also id.* at 222-24. "Cooperative" means "marked by a *willingness* and ability to work with others in a common effort." *Webster's Third New International Dictionary of the English Language Unabridged* 501 (Philip B. Gove ed., 4th ed. 1976) (emphasis added).

It flies in the face of the legislative intent, semantics, and logic to conclude that an ultimate agreement reached involuntarily through refusals to deal is protected by the McCarran-Ferguson Act in light of the legislative intent to protect certain cooperative efforts and in light of the "boycott, coercion, or intimidation" provision of section 3(b).

It would be ironic were the conduct of defendants in this case not to constitute boycott, coercion, or intimidation in light of the holding in *Barry*. *Barry* concerned a voluntary agreement among four companies by which three of the companies "refused to deal on any terms with the policyholders of the fourth as a means of compelling them to submit to new ground rules set by the fourth."[22] *Barry*, 438 U.S. at 533. The result in this case is the same as the result in *Barry*: a limitation of the terms of coverage. The same goal was achieved by

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[22] As in this case, the objective of defendants' conduct in *Barry* was to eliminate occurrence coverage and offer only claims-made coverage.

the same means. Here, the refusal to deal was directed towards uncooperative insurers; in *Barry*, the refusal was directed at policyholders.

It is equally ironic that the defense (petitioners) in *Barry* argued that facts identical to those in this case fell within the boycott exception, whereas the facts in *Barry* did not.[23] The petitioners in *Barry* argued the significance of *S.E.U.A.* as follows:

> This Court distinguished between the agreements among the conspirators to fix the terms on which insurance would be sold and the coercive measures adopted by the conspirators to force other insurance companies and agents into the conspiracy or out of the business. It was only this latter category of activity to which the words boycott, coercion and intimidation were applied.

Brief for Petitioners at 25, *Barry*, *supra* (No. 77-240). The *Barry* petitioners argued the significance of the legislative history as follows:

> The legislative debates show that in enacting the boycott exception Congress was concerned with blacklists and similar punitive measures used by members of an industry to compel other traders to conform their competitive practices to those dictated by the conspiracy or to be excluded from competition. This was conduct characterized as a boycott in *South-Eastern Underwriters* and other boycott cases that have been decided by this Court under the Sherman Act.

Id. at 29.

C. Defendants' Conduct is a Boycott, Coercion, or Intimidation as Defined in *St. Paul Fire and Marine Insurance Co. v. Barry*.

Defendants' alleged conduct in the present case falls squarely within the concept of boycott set forth in *Barry*:

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[23] There is some identity among petitioners in *Barry* and petitioners in the case *sub judice*. The Aetna Casualty & Surety Company and Hartford Insurance Company were petitioners in both cases.

> The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott.

Barry, 438 U.S. at 544-45 (citations omitted). In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), this Court defined a boycott under the *per se* rule as:

> [J]oint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle."

Id. at 294 (quoting L.A. Sullivan, *Handbook on the Law of Antitrust* 261-62 (1976)). In present case, the primary insurer defendants, unable to achieve voluntary agreement on limiting the terms of CGL coverage with the other primary insurers, joined with reinsurers to deprive other primary insurers of the reinsurance they needed to offer competing forms of coverage, such as occurrence coverage, that the primary insurer defendants wanted to eliminate. As a result, those other primary insurers involuntarily capitulated. In *Barry*, the Court cited to Bird, *Sherman Act Limitations on Non-Commercial Refusals to Deal*, [1970] Duke L.J. 247, 263:

> As one commentator has noted: "If an individual competitor lacks the bargaining power to get a particular contract term, the courts apparently will not let him join with other competitors and use their collective bargaining power to compel the insertion of such a term into the contract, no matter how desirable." *Bird, supra*, n.11, at 263, discussing *inter alia*, *Binderup v. Pathe Exchange; Paramount Famous Corp. v. United States*, 282 U.S. 30, 51 S.Ct. 42, 75 L.Ed. 145 (1930)

Barry, 438 U.S. at 545 n.17.

Senator O'Mahoney, one of three Senators on the Conference Committee that drafted the boycott exception, defined coercive conduct the same way, anticipating a case such as the one *sub judice*:

> Therefore, any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited by this provision [the boycott exception].

91 *Cong. Rec.* S1480 (1945).

D. Boycotts Violative of the Sherman Act Include Conditional, As Well As Absolute, Boycotts.

Lastly, petitioners urge, and the district court found, that a boycott under the McCarran-Ferguson Act must be an absolute boycott, a refusal to deal "on any terms." *See Insurance*, 723 F. Supp. at 476 (A-50). The district court relied upon the statement in *Barry* that:

> [*Barry*] induced its competitors to refuse to deal on any terms with its customers. *This agreement did not simply fix rates or terms of coverage*; it effectively barred St. Paul's policyholders from all access to alternative sources of coverage and even from negotiating for more favorable terms elsewhere in the market.

Id. (A-50) (emphasis added by district court).

The district court's interpretation appears to immunize conduct which otherwise would constitute a boycott, coercion, or intimidation. Under this interpretation, a group of insurers has absolute immunity to use any coercive methods available to compel another group of insurers to adopt, against their will, certain practices dictated by the first group. Is that the intent of the *Barry* decision? Even the dissent in *Barry* recognized that it was not, stating that "the legislative debates on [the McCarran-Ferguson] Bill, the Committee Reports, and the design of the statute itself" referred to "the kinds of antitrust violations alleged in *South-Eastern Underwriters*—that is, attempts by members of the insurance business to

force other members to follow the industry's private rules and practices." *Barry*, 438 U.S. at 565 (Stewart, J., dissenting).

The Ninth Circuit rejected the "on any terms" limitation. In reviewing that opinion, Professors Areeda and Hovenkamp agreed:

> The Ninth Circuit replied *correctly* that "boycott" "encompasses a conditional refusal to deal except on the terms demanded. The evil of a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms."

P. Areeda & H. Hovenkamp, *Antitrust Law*, § 210.2, at 124 (Supp. 1992) (quoting *Insurance*, 938 F.2d at 930) (emphasis added). Boycotts violative of the Sherman Act include conditional, as well as absolute, boycotts.[24] In *South-Eastern Underwriters, supra*, the boycott was conditional. The defendants jointly refused to deal (including issuing reinsurance) except on their terms. In *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 461-62 (1941), the Guild members (garment manufacturers) conspired to boycott retailers who sold garments "copied by other manufacturers from designs put out by guild members." As a result of that pressure, more than six hundred (600) retailers involuntarily signed agreements not to buy garments from those other manufacturers. As a result, Guild members sold garments to those retailers. *See Fashion Originators'*, 312 U.S. at 461-62. In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), certain manufacturers and distributors conspired "either not to sell to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms." 359 U.S. at 209. In each of the above cases, the boycotts were not absolute. In each of the above cases, defendants would do business with the boycotted "target" if the "target" agreed to certain terms.

[24] The definition of "boycott" is the same under both the McCarran-Ferguson Act and the Sherman Act. *See Barry*, 438 U.S. at 549-50; *see also id.* at 556 (Stewart, J., dissenting).

Thus, in the case at bar, pursuant to an alleged conspiracy, certain reinsurers would not offer reinsurance to primary insurers that would not adopt the CGL coverage limitations which Hartford and the other primary insurer defendants demanded.

Since the agreement among the insurance companies in *Barry* was *voluntary*, the Court may have required a refusal to deal on any terms with the policyholders. But in the case *sub judice*, the agreement among the insurance companies is alleged to be involuntary. It is alleged that certain primary insurers enlisted the aid of reinsurers to coerce (through joint refusals to deal) unwilling insurers to exclude certain terms of coverage from their policies. Nothing is to be gained by requiring a refusal to deal to be absolute when it has the coercive effect its perpetrators intended it to have. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1984), the boycott involved did not totally exclude the plaintiff from access to the defendants' wholesale operations. In positing whether a refusal to deal that allowed limited access by the plaintiff to defendant's wholesale operations constituted a boycott/refusal to deal, the Court reasoned:

> Such activity might justify *per se* invalidation if it placed a competing firm at a severe competitive disadvantage.

Northwest Wholesale, 472 U.S. at 295 n.6 (in dicta). This suggests that if the boycott has the effect of causing "a severe competitive disadvantage," it need not be a complete boycott and could still be a *per se* violation. In the case *sub judice*, in the very least, "severe competitive disadvantage" is alleged to have resulted from the conspiratorial refusal to deal involving reinsurance.

II. THE ACTIONS OF THE REINSURERS AS ALLEGED IN THE COMPLAINT ARE OUTSIDE RELEVANT STATE REGULATION AND THEIR ACTIONS ARE NOT SUBJECT TO McCARRAN-FERGUSON IMMUNITY.

A. The Reinsurers' Activities Alleged In The Complaint Are Not Regulated By State Law.

The Complaint alleges that the foreign reinsurers jointly refused to offer reinsurance for certain CGL coverages,[25] (Cal. Compl. ¶¶ 116-120, 131-140 (Claims 2, 5, & 6), J.A. 37-39, 43-46), and allege that these boycotts are actionable both in themselves, (Cal. Compl. ¶¶ 126-140 (Claims 4, 5, & 6), J.A. 41-46), and as part of a broader concert of action undertaken with domestic reinsurers, (Cal. Compl. ¶¶ 116-130, 146-150 (Claims, 2, 3, 4, & 8), J.A. 37-43, 47-49), as well as with certain primary insurers. *See id.*

The Complaint alleges that the states do not regulate reinsurance in the sense that confers McCarran-Ferguson Act immunity. The California Complaint alleges that "[u]nlike primary insurance companies, the business of reinsurance companies is not regulated by the states, with only certain limited exceptions concerning financial solvency." (Cal. Compl. ¶ 37, J.A. at 19.) Although these allegations must be taken as true at this juncture as a matter of law, there are supported by virtually all the leading authorities on reinsurance. *See, e.g.*, C.F. Aldrich, *Regulation, Accounting, and Statistics, in Reinsurance*, (R. W. Strain ed. 1980) 615, 621 ("[R]einsurance has been traditionally subject to little, if any, specific state regulations of the type contemplated by the McCarran-Ferguson Act"); B.L. Webb *et al.*, 2 *Principles of Reinsurance* 163-164 (1990); J.C. Gurley, *Regulation of Reinsurance in the United States*, 19 Forum 72, 76 (1983) ("[T]he states have enacted virtually no legislation which purports to regulate the terms and conditions of reinsurance transactions. . . . Curiously, few states have enacted laws designed to protect the financial solvency of reinsurers"); C.W. Havens & R.M. Theisen, *The Application of United States and EEC Antitrust Laws to Reinsurance and Insurance Pooling Arrangements*, 54 Antitrust L.J. 1299, 1304 (1986) ("[R]einsurance transactions have been excluded from most state insurance laws regulating the insurer-insured relationship"); B.C. Sullivan, *Reinsurance in the Age of Crisis*, 38 Fed'n of Ins. & Corp. Counsel Q. 3, 19 (1987) ("Traditionally, reinsurers, unlike primary insurers, have conducted their business free from the constraints of regulation").[26]

Indeed, a recent case note otherwise critical of Judge Noonan's decision, grudgingly concedes that, "[t]he

[25] Both the court of appeals and the district court held that respondents as consumers had standing to challenge the foreign reinsurers' boycott of reinsurance, *see Insurance*, 723 F. Supp. at 483; 938 F.2d at 926-27, as well as the conspiracy including the domestic insurers and reinsurers. This Court did not grant Petitioners' Writ for Certiorari on this issue.

[26] The authority cited by *Amici* National Association of Casualty & Surety Agents *et al.* (Brief for *Amici* National Ass'n of Cas. & Sur. Agents *et al.*, at p. 10) to support their assertions concerning the pervasiveness of the States' regulation of reinsurance demonstrate the contrary: that such regulation is exceptional. *Taggart v. Keim*, 103 F.2d 194 (3d Cir. 1939), and *Ballou v. Davis*, 75 F.2d 138 (7th Cir.), *cert. denied*, 295 U.S. 766 (1935), concern the authority of the states to regulate reinsurance contracts entered into by insolvent insurance companies, which the state is either operating or on the verge of operating. *See Taggart*, 103 F.2d at 196; *Ballou*, 75 F.2d at 139.

Amici cite *Coppage v. Resolute Ins. Co.*, 264 Md. 261, 285 A.2d 626 (1972), to demonstrate that states commonly regulate reinsurance relations to protect insurer solvency. The statute in *Coppage*, however, applied solely to reinsurance contracts in which the insurer ceded "the *entire* schedule of policies . . ." to the reinsurer. *Id.* at 270, 285 A.2d at 631-32 (emphasis added). Clearly, when an insurer reinsures all of its business, it effectively transfers its insuring function to another corporation and relies on the solvency of that company in order to pay claims. If such transactions were allowed without strict regulation, insurers could readily circumvent the state's solvency regulations. However, even such solvency regulation of reinsurers is rare. *See* Gurley, *Regulation of Reinsurance in the United States*, *supra*, at 76.

Court may have inadvertently reached the correct result because most states do not regulate reinsurance." Note, 105 Harv. L. Rev. 1414, 1417 n.42 (1992). In fact, there is no regulation at all of foreign insurers with no domestic domiciliary—neither of rates and forms nor of solvency. *See* Webb *et al.*, 2 *Principles of Reinsurance*, *supra*, at 164. Thus, there is no regulation of any of the defendant foreign reinsurers in any of the relevant states. (*See* States' Regulatory Appendix ¶ E, J.A. at 225-250).

1. *The Ninth Circuit Followed the Position Long Accepted by the Insurance Industry in Holding That Foreign Reinsurers Were Not Subject to McCarran-Ferguson Immunity.*

Adhering to the basic principle that "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties," *Royal Drug Co.*, 440 U.S. at 231, the Ninth Circuit held that petitioners lost their McCarran-Ferguson Act immunity by conspiring with foreign entities that lacked immunity because they were not subject to state regulation. *See Insurance*, 938 F.2d at 928 (A-19). Following *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 298-99 (1960), barring extraterritorial state regulation of insurance within the United States, the Ninth Circuit held that, *a fortiori*, McCarran-Ferguson Act immunity did not extend to foreign reinsurers, which, as a matter of law, could not be regulated by the states. *See Insurance*, 938 F.2d at 928 (A-20). Rather than "an unprecedented ruling with devastating impact on the insurance industry," (Brief for Petitioners in No. 91-1111 at 15), the decision followed accepted interpretation of *Travelers Health* and adopted the precise position accepted by the reinsurance industry since at least 1975 in both professional publications and public speeches, *i.e.*, that the absence of state regulation left both domestic and foreign reinsurers subject to the antitrust laws.

Regarding the foreign reinsurers, the Ninth Circuit followed the leading treatise on antitrust regulation of foreign business:

> The implications of this reasoning for foreign commerce would appear clear: since state insurance schemes do not, and could not, purport to regulate the bulk of international insurance transactions, the federal antitrust laws are fully applicable. This may be one area where the international nature of the transaction enhances antitrust risks.

J. Atwood & K. Brewster, *Antitrust and American Business Abroad* 78 (2d ed. 1981) (footnote omitted) (cited in *Insurance*, 938 F.2d at 928 (A-20)).

Atwood and Brewster's conclusions had been anticipated even earlier by the president of the RAA, who in 1975 had gone further, explaining in *Forum*, a publication of the American Bar Association, that American insurers themselves could not rely upon McCarran-Ferguson Act immunity in dealing with foreign entities. *See* C.W. Havens, *Extraterritorial Effect of the Antitrust Laws on Insurers—Some Observations and Questions*, 11 Forum 30, 37 (1975). Havens had cautioned that, "if an activity of an American insurer, whether it involves section 1 or 2 of the Sherman Act or section 7 of the Clayton Act, affects the 'foreign commerce' of the United States, then that insurer must be concerned about application of those federal statutes and cannot rely upon a McCarran-Ferguson antitrust exemption . . . ." *Id.*

2. *Rather Than Upsetting The Status Quo, the Ninth Circuit Reaffirmed The Basis For The Present Insurance Market Under Which Reinsurance Has Been Left Unfettered By State Regulation.*

Even the *domestic* reinsurers had long recognized that the trade-off for operating unfettered by state regulation what that they lacked the McCarran-Ferguson Act immunity that extended to primary insurers. N. David Thompson, president and chief executive officer of defendant North American Re, expressed this view:

> Reinsurers have generally conducted their operations free from the type of regulation to which primary insurers are subject in most jurisdictions. Reinsurance

rates are not approved or filed. Reinsurance treaty provisions are not governed by statute or regulation, except for special matters such as the nearly universal insolvency clause. . . . Thus, reinsurers have been outside the protections of the McCarran-Ferguson Act and so, at least, since the decision in the *South Eastern Underwriters* case, they are fully exposed to the enforcement of the antitrust laws, state as well as federal. (Footnote omitted.)

N.D. Thompson, *Critical Issues of the Eighties: How Trends in Reinsurance Will Affect Legal, Legislative, and Regulatory Actions*, 16 Forum 1038, 1055 (1981).

C.F. Aldrich, the president of Kemper Reinsurance, took the same view in a leading text on reinsurance:

> In addition, reinsurance has been traditionally subject to little, if any, specific state regulations of the type contemplated by the McCarran[-Ferguson] Act. As a result, reinsurance activities are more subject to antitrust exposures arising from a failure of the McCarran shelter than the majority of insurance industry activities.

C.F. Aldrich, *Regulation, Accounting, and Statistics in* R. W. Strain, *Reinsurance* 615, 621 (1980).[27] *Accord* J.C. Gurley, *Regulation of Reinsurance in the United States*, 9 Forum, 72, 91 ("Reinsurance companies and pools which conduct their affairs as though the McCarran-

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[27] The article includes a biography describing Mr. Aldrich's extensive background in the industry:

> For over tweny years he has been in the insurance business [as] a member or chairman of many association committees dealing with such areas as reinsurance, marine insurance, group health insurance, rate regulations, and legal matters. He is a trustee of the U.S. Council of the International Chamber of Commerce. He also is chairman of the Industry Advisory Committee to the Subcommittee on Reinsurance, Syndicates, and Pools of the National Association of Insurance Commissioners.
>
> From the formation of Kemper Reinsurance Company, he has served as its chief operating officer and currently is its president and chief executive officer.

Aldrich, *supra*, at 641-42.

Ferguson Act exempts them from antitrust scrutiny leave themselves open to attack").

Echoing the view of the industry itself, the January, 1977 Report of the U.S. Department of Justice to the Task Group on Antitrust Immunities stated, "[i]nsofar as reinsurance rates are not regulated by the states, reinsurers are presently subject to federal antitrust restraints." *The Pricing and Marketing of Insurance: A Report of the U.S. Department of Justice to the Task Group on Antitrust Immunities* 266 n.477 (1977).

The absence of state regulation of reinsurers is the result of jurisdictional bars to adequate regulation,[28] practical difficulties arising from the extensive foreign involvement,[29] the perception that reinsurance included sophisticated professionals for whom state regulation was unnecessary,[30] and the belief that state regulation would impede the marketplace for reinsurance.[31] In short, it is a scheme that until now the insurance industry has wanted, accepted, and actively advocated.[32]

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[28] *See, e.g.*, B.L. Webb *et al.*, 2 *Principles of Reinsurance* at 164 (1990); Gurley, *supra*, at 76.

[29] *See, e.g.*, Webb *et al.*, *supra* at 163-64. Havens and Theisen, citing Insurance Information Institute, *Reinsurance: Fundamentals and Current Issues* 57 (1983), report that "[a]pproximately twenty-five percent of reinsurance premiums in the United States are paid to alien, nonadmitted reinsurers." C.W. Havens & R.M. Theisen, *Application of United States and EEC Antitrust Laws to Reinsurance and Insurance Pooling Arrangements*, 54 Antitrust L.J. 1299, 1301 & 1301 n.5 (1986).

[30] *See, e.g.*, Havens and Theisen, *supra*, at 1303; N. David Thompson, *Critical Issues of the Eighties: How Trends in Reinsurance Will Affect Legal, Legislative, and Regulatory Actions*, 16 Forum 1038, 1043; Gurley, at 76.

[31] Havens & Theisen, *supra*, at 1303-04.

[32] *See* B.C. Sullivan, *Reinsurance in the Age of Crisis*, 38 Fed'n of Ins. & Corp. Counsel Q. 3, 19 (1987) ("[T]he potential for positive long-term effects from reinsurance regulation is open to question"); S. Tarnoff, State Regulators Call For Increased Reinsurance Data, *Business Insurance*, at 30 (Nov. 2, 1981) ("Reinsurance is

Rather than upsetting an extant scheme, the Ninth Circuit recognized that the marketplace, as it existed, lacked significant state regulation and preserved that situation by reemphasizing the limitations upon state regulation.

At least since *Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 405 (1929), "the negotiation and execution outside the state, of a contract of reinsurance is not doing business in the state where the insured property is situated and the original risk was assumed. Reinsurance effected under a contract made in one state does not constitute doing business in another, although the risks covered by the reinsurance agreement were in the latter state . . . ." M.S. Rhodes, 2A *Couch Cyclopedia of Insurance Law*, § 21:54 at 380 (2d rev. ed. 1984 & Supp. 1992). *Morris* itself held that Mississippi lacked jurisdiction over a reinsurer which had entered into a reinsurance contract in New York of a risk located in Mississippi.

FTC v. Travelers Health Ass'n, 362 U.S. 293 (1960), recognized that this principle survived passage of the McCarran-Ferguson Act and limited a state's power to regulate in any way contracts of insurance or reinsurance outside its jurisdiction even though the risks covered were risks within the state. *See Travelers*, 362 U.S. at 300-01.

Two years later, *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 456 (1962), reemphasized the particular limitations no state regulation of reinsurance, holding that Congress in passing the McCarran-Ferguson Act had "indicated without ambiguity that such state 'regulation or taxation' [of insurance] should be kept within the limits set by the Allgeyer, St. Louis Cotton Compress, and Connecticut General Life Insurance decisions." *See id.* (quoting 15 U.S.C. § 1012(a)).

Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, 80-81 (1938), held that California lacked any au-

not an area where regulation is warranted or where it can be effective" (quoting J. Smith, insurance lawyer)).

thority to tax reinsurance premiums paid in Connecticut to an insurer authorized to do business in California by other insurers authorized to do business in California for risks located in California. *Allgeyer v. Louisiana*, 165 U.S. 578, 590-91 (1897), forbade a state from punishing a resident for entering into an out-of-state insurance contract and announced that the state could never regulate an insured's out-of-state contracting. In *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 348-49 (1922), Justice Holmes, writing for a unanimous Court, held that Arkansas could not even tax the insurance premiums paid by a company lawfully doing business in Arkansas to a Missouri insurer under a contract entered into in Missouri but covering property located in Arkansas. Although the constitutional bases of these holdings have eroded, *Todd Shipyards* rejected any suggestion that the evolving standards of due process changed the results because, "[w]hen therefore, Congress has posited a regime of state regulation on the continuing validity of specific prior decisions, we should be loath to change them." *See Todd*, 370 U.S. at 457 (citation omitted); *see also Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 n.8 (1985) ("[T]he legislative history of The McCarran-Ferguson Act reveals . . . that Congress did not intend thereby to give the states any power to tax or regulate the insurance industry other than what they had previously possessed").

As a result, the reinsurance industry has operated outside the jurisdictional reach of state regulators, who generally have forborne attempts to regulate reinsurers. As a basic example, reinsurers are generally not required to be licensed in states other than their domicile.[33] The NAIC 1968 Unauthorized Insurers Model Statute provide that the "lawful transaction of reinsurance" is exempted from the requirement that a certificate of authority be obtained.[34] Thus, alien reinsurers are not licensed in any state. As a leading treatise explains:

[33] *See* Webb *et al.*, 2 *Principles of Reinsurance*, *supra*, at 163.

[34] *See* J.C. Gurley, *Regulation of Reinsurance in the United States*, 19 Forum 72, 76-77 (1983).

Alien reinsurers are not subject to individual state reporting laws. Their financial reports frequently represent different time intervals, state values in different currencies, and present results in different formats. . . .

Rates and Forms. Reinsurance forms and rates are not required to be filed for approval. The reinsurance business, being intrastate, interstate, and international, and necessarily limited to unique situations of the primary companies reinsured or the individual risks reinsured, does not lend itself to strict regulation of forms and rates. This lack of regulation of rates and forms creates problems in analyzing the financial solvency of reinsurers, since it is more difficult to know of all of the obligations and pricing of the reinsurer under its tailor-made reinsurance contracts.

B.L. Webb *et al.*, 2 *Principles of Reinsurance* 164 (1990).

The international character of reinsurance also has led to state regulatory forbearance because, "[b]urdensome state laws would inhibit reinsurers' ability to deal in international markets and to spread further the risks they have assumed." C.W. Havens & R.M. Theisen, *Application of United States and EEC Antitrust Laws to Reinsurance and Insurance Pooling Arrangements*, 54 Antitrust L.J. 1299, 1302 (1986).

Thus, because of legal constraints and because of the arguments of primary insurers and reinsurers that their dealings were best left unregulated by the states, a scheme evolved under which there has been no state regulation of the transactions, entities or conduct. Until the present case, the insurance industry acknowledged that the absence of state regulation placed reinsurance outside the McCarran-Ferguson exemption and that in dealing with reinsurers, they were subject to federal antitrust regulation. Rather than upsetting this scheme, the Ninth Circuit maintained the status quo.

B. By Failing To Observe The Terms Of Their Immunity, All Defendants Forfeited Their McCarran-Ferguson Act Exemption For The Conduct Undertaken Pursuant To The Conspiracy.

By conspiring with the unregulated and non-immune reinsurers, whether domestic or foreign, the domestic primary insurers and reinsurers lost their immunity for those activities undertaken in concert with the foreign reinsurers. "An exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." *Royal Drug Co.*, 440 U.S. at 231. *Accord National Broiler Marketing Ass'n v. United States*, 436 U.S. 816, 825 (1978) (Capper-Volstead immunity); *Ramsey v. United Mine Workers*, 401 U.S. 302, 313 (1971); *Case-Swayne Co. v. Sunkist Growers Inc.*, 389 U.S. 384, 393 (1968); *United Mine Workers v. Pennington*, 381 U.S. 657, 665-66 (1965).

Because the purpose of the McCarran-Ferguson Act "is not to exempt the insurance industry as such from the antitrust laws," *Group Life & Health*, 440 U.S. at 232 n.40, but rather to create a complementary scheme of regulation providing for federal regulation in those areas unregulated by the states, the rationale of the forfeiture doctrine applies with particular force in this case. *See also* 91 *Cong. Rec.* 475 (1945) (J.A. 217); 91 *Cong. Rec.* 1480 (1945) (J.A. 221-22); 13 *Public Papers & Addresses of Franklin D. Roosevelt: 1944-45* 587 (Rosenman ed. 1950) (J.A. 224). The foreign reinsurers are beyond the reach of the states' regulatory authority, and the only means for an aggrieved party to reach the conspiracy is under federal law.[35] As a leading article explains in the context of the reinsurance industry:

It is usually said that the business of insurance enjoys an exemption from the federal antitrust laws under the McCarran-Ferguson Act. It is more accurate to say that the federal antitrust laws apply to the busi-

[35] Even assuming, *arguendo*, that the industry and states were wrong in their perception of the scope of state regulation, reinsurance has been unregulated as a result of their perception.

ness of insurance *except* to the extent that the business is regulated by state law. This latter perspective is significant in considering the application of the antitrust laws to reinsurance and insurance pooling arrangements. Because of the nature of reinsurance and the special functions served by reinsurance and insurance pools (including their role in international commerce), many reinsurance practices are not regulated by the states in the same manner as direct insurance. Where there is a gap in regulation, jurisdiction presumably lies under the federal antitrust laws.

C.W. Havens & R.M. Theisen, *Application of United States and EEC Antitrust Laws to Reinsurance and Insurance Pooling Agreements*, 54 Antitrust L.J. 1299 (1985) (footnotes omitted) (emphasis in original).

Petitioners seek to evade this basic principle by arguing that the McCarran-Ferguson Act is distinguishable from other antitrust exemptions because it immunizes "the business of insurance," rather than particular entities. Petitioners argue that so long as an *aspect* of the business (here the submission of final forms to state regulators by the insurers) is subject to state regulation, even the unregulated activities of foreign reinsurers in their negotiations of reinsurance with the primary insurers are immunized. The only way, however, that state regulators could reach the reinsurers' activities is by ineffective attempts to coerce the conduct of reinsurers through regulation of primary carriers. These attempts would likely be found to transgress the limitations upon state regulation found in *Travelers Health*, *Todd Shipyards*, *Connecticut General*, *St. Louis Cotton* and *Allgeyer*.

In this case, mere submission of coverage proposals for approval does not provide states with regulatory authority to remedy the reinsurers' boycott of various types of insurance, such as occurrence forms and pollution coverage. Without the reinsurers' aid in coercing the recalcitrant primary insurers to capitulate through a concerted refusal to reinsure, the primary insurers would have been unable to force ISO to limit the coverage proposals presented for state review and to limit the coverage actually offered by other primary insurers. State regulators would have had a variety of coverage proposals before them for approval, including the original 1984 standards. Because state regulators lacked authority to reach the foreign reinsurers' boycott, they could not effectively remedy the conduct through the "indirect regulation" of the approval process. *Cf. Travelers Health Ass'n*, 362 U.S. at 298 n.4 (in a similar context, "there still would not be regulation by state law within the meaning of the § 2(b) proviso because the [state] statutes could not be effectively enforced against" the offending parties). They were restricted to approving or disapproving the limited forms submitted to them as a result of the conspiracy.

Petitioners' argument that there was not forfeiture because, as a practical matter, the ultimate forms were submitted to regulatory review, is similar to that rejected in *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 395 (1967), that the inclusion of non-immune entities was of "no economic significance," since the defendants could have undertaken the same conduct with the same economic effect without participation of the non-exempt entities. The argument carries even less weight here, where there is a fundamental "economic significance"—restriction of coverage.

Petitioners reduce the Ninth Circuit's decision to the absurd by arguing that a necessary consequence of their dealings with any non-immune entity (necessarily a part of their business) would strip them of all their immunity. Similarly, they erroneously argue that the holding will preclude necessary contacts with consumer and other advocacy groups. Petitioners are wrong in arguing that their contracts with reinsurers would necessarily strip them of *all* immunity. Immunity is lost because the otherwise immune party becomes jointly and severally liable for the acts of the non-immune co-conspirator. *See Beltz Travel Serv., Inc. v. International Air Transp. Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980). The otherwise immune entity does not lose all immunity for its other activities, but only for those activities taken pur-

suant to its conspiracy with the non-immune entities that violate the antitrust laws. *See International Raw Materials, Ltd. v. Stauffer Chem. Co.*, —— F.2d ——, ——, 1992-2 Trade Cas. (CCH) ¶ 70,016, at p. 68, 990-91 (3d Cir. Oct. 30, 1992); *see also Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. at 400-01 (1968) (White, J., concurring in the result) ("An exempt organization may not conspire with an outsider to violate § 1, but if it does, it does not forfeit its immunity except for that transaction").[36] Similarly, an immune entity would not lose its immunity for legal contacts with advocacy groups. Only where, as here, the non-immune entity was engaged in illegal activity would immunity be lost as a result of the *concerted* action with the non-immune entity.

Royal Drug held that where an entity otherwise immune under the McCarran-Ferguson Act because it was engaged in the business of insurance conspired with an entity that was not engaged in the business of insurance, the otherwise immune entity lost its immunity. To have held otherwise would have extended McCarran-Ferguson immunity to activities by persons outside the bounds demarcated by the Act.

Here, entities otherwise immune under the McCarran-Ferguson Act because certain of their activities are regulated by state law—a second specific requirement of the Act—seek to extend McCarran-Ferguson immunity to activities not regulated by state law and to entities not even within the regulatory jurisdiction of the states. The situation is analytically indistinguishable from *Royal Drug*; however, the policy reasons for limiting immunity are greater here, because to extend the immunity here would violate the fundamental scheme of the Act, which

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[36] In dismissing this argument in a footnote, the district court fell into identical error, itself relying on a footnote in *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv. Bureau*, 701 F.2d 1276, 1288 n.12 (9th Cir. 1983), which assumed that, by associating in any way with a non-immune entity, an insurer "would forfeit all of its exemption from the antitrust laws," a result the court found absurd.

is to regulate the market by providing immunity only where activities are regulated by state law and to reaffirm the application of the antitrust laws where, as here, such state regulation is absent.

III. THE NINTH CIRCUIT PROPERLY DETERMINED THAT THE UNITED STATES DISTRICT COURT HAS SUBJECT MATTER JURISDICTION OVER THE CLAIMS ASSERTED AGAINST THE LONDON DEFENDANTS.

The London defendants challenge the Ninth Circuit's ruling that an American federal court has and should exercise subject matter jurisdiction under the Sherman Act over certain claims in the California Complaint (Cal. Compl. ¶¶ 131-40 (Claims 5, 6 and 8), J.A. 43-49) and in the Connecticut Complaint (Conn. Compl. ¶¶ 125-39 (Claims 3, 4 and 5), J.A. 92-97)[37] ("London Reinsurance claims"). Although the London defendants challenge jurisdiction over these claims because they are the only claims asserted solely against these London-based defendants, many of the London defendants are named in other claims. (Cal. Compl. ¶¶ 116-30, 141-45 (Claims 2, 3, 4, and 7), J.A. 37-43, 46-47.)

A. The London Defendants Mischaracterized The Allegations Supporting The "London Reinsurance Claims."

The London defendants distort the allegations in the Complaint. They mischaracterize the conduct detailed in the London Reinsurance claims as the actions of foreign reinsurers in a foreign market endeavoring through longstanding practices to reduce their exposure to certain risks. This is not what the Complaint alleges.

The Fifth Claim alleges that the London defendants associated with Lloyd's of London ("Lloyd's defendants")

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[37] Because claims in the two Complaints are analogous and because the California Complaint has been used as the standard complaint in this Brief, all references henceforth shall be to the California Complaint, unless the differences in allegations should be material.

boycotted all North American risk for occurrence coverage ("Occurrence Boycott"). Cal. Compl. ¶¶ 131-35, J.A. 43-44; Conn. Compl. ¶¶ 125-29, J.A. 92-94.) The Complaint describes how the Lloyd's defendants' Occurrence Boycott continued their prior agreements with American defendants to eliminate occurrence coverage from the American insurance market and to coerce the American primary insurers into accepting only claims-made coverage. (Cal. Compl. ¶¶ 86-88, J.A. 30-31.) Hence, the Complaint alleges that the Lloyd's defendants were continuing their joint effort with the American insurers and reinsurers to drive an insurance product out of the American insurance market.

The Sixth Claim alleges that the Lloyd's and other defendants associated with the London Company boycotted all American CGL risk written on a policy that failed to exclude pollution coverage ("Pollution Liability Boycott"). Cal. Compl. ¶¶ 136-40, J.A. 45-46.) The Complaint delineates the history of the Pollution Liability Boycott, (Cal. Compl. ¶¶ 93-96, J.A. 31-32), and alleges that the Pollution Liability Boycott was part of a "continuing agreement, understanding and concert of action," not just to limit the London defendants' exposure to pollution risks, but "to limit the availability of pollution coverage in U.S. primary casualty insurance." (Cal. Compl. ¶ 138, J.A. 45.)

The Eighth Claim alleges that the London defendants boycotted all North American property risks written on a policy without a pollution exclusion (the "Pollution Property Boycott"). (Cal. Compl. ¶¶ 146-50, J.A. 47-49.) The Complaint incorporates into this claim further description of the Pollution Property Boycott. (Calif. Compl. ¶¶ 106-10, J.A. 34-35.) In fact, the Complaint alleges that the defendants agreed, in writing, "to use their best endeavors to ensure that all U.S.A. and Canadian exposed insurance/reinsurance" would contain a pollution exclusion, that this was a continuing agreement to limit the availability of property insurance and pollution coverage in the United States, and that this agreement

grew to include numerous American reinsurers. (Cal. Compl. ¶¶ 108, 109, 148, J.A. 35, 48.)

Taking all the allegations of the Complaint in their entirety as true, the conduct underlying the three boycott claims was but one fragment of an overall agreement among all defendants to restrain the availability of primary insurance coverage for long tail and pollution risks *in the United States*.[38]

B. The Teachings Of This Court Support The Assertion Of Subject Matter Jurisdiction Over These Claims.

"[C]ourts of the United States have the power and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990). Under the Sherman Act, this Court has never held that a federal court lacked subject matter jurisdiction, or should not exercise that jurisdiction, over foreign actors whose foreign conduct was intended to and in fact caused substantial effects on American markets, as alleged herein. Rather, this Court has repeatedly affirmed that conduct is within American courts' jurisdictional reach under the Sherman Act simply if it involves foreign actors or occurs abroad. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) ("A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries"); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 (1952) (There is no "blanket immunity or trade practices which radiate unlawful con-

[38] The Connecticut Complaint specifically alleges this in its First Claim. (Conn. Compl. ¶¶ 115-19, J.A. 88-90.) Allegations in the earlier-filed California Complaint command a reasonable inference that the actions of these three claims were carried out in furtherance of this agreement. The Connecticut claim was dismissed by the district court. The Ninth Circuit affirmed the dismissal but granted leave to amend on remand stating the "plaintiffs' basic theory is maintainable." *See Insurance*, 938 F.2d at 931 (A-26-27).

sequences here, merely because they were initiated or consummated outside the territorial limits of the United States"); *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917) (Agreement formed abroad by foreign entities held within the reach of the Sherman Act because agreement "affected the foreign commerce of this country and was put into operation here"); *United States v. Pacific & A. Ry. & Nav. Co.*, 228 U.S. 87, 105-06 (1913) (American antitrust laws apply to agreement to control transportation in the United States even though agreement included foreign actors exercising control over foreign transportation routes); *see also United States v. Aluminum Co. of Am.*, 148 F.2d 416, 442 (2d Cir. 1945) ("*Alcoa*")[39] (Although the Sherman Act does not cover every foreign agreement causing effects in the United States, "a state may impose liabilities, even upon persons not within its allegiance for conduct outside its borders that has consequences which the state reprehends"). Given the lengthy history of this Court's decisions concerning the reach of the Sherman Act and the settled expectations these have no doubt generated, there is no reason for this Court to apply the Jones Act or Title VII determinations, as petitioners suggest.

Never has this Court suggested that the defendants' "principles of international comity" should bear on the assertion of jurisdiction over foreign actors whose actions in foreign countries are intended to cause and do cause major disruptions in American markets. In ruling on the propriety of international comity in *Kirkpatrick*, this Court held that such rationales should not be used for the "purposes of expanding judicial incapacities . . . ." *Kirkpatrick*, 493 U.S. at 408.

Repeatedly, this Court has held that under the Sherman Act, American courts should assert jurisdiction over foreign conduct, in foreign countries, which has anything

[39] The Second Circuit heard this case as a court of last resort. This Court cited *Alcoa* with approval in *Continental Ore Co. v. Union Carbide*, 370 U.S. at 704.

more than an incidental effect on American markets. Plaintiffs' allegations state that the foreign defendants' overseas conduct aimed to restrict the availability of insurance products to Americans and that, within the United States, many of these foreign defendants also conspired and joined with the American defendants, for the same illicit purpose, in other unlawful conduct.

C. The Decisions Of The Ninth Circuit And The Other Courts Of Appeals Support The Exercise Of Subject Matter Jurisdiction Over These Claims.

Lower courts have identified several factors to be weighed in determining when American law should be applied extraterritorially. *See Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Restatement Foreign Relations Law* (3d) § 403 (1987). Defendants' assertion that "the most critical of these factors is conflict with the law or policy of another nation," (Brief for Petitioners in No. 91-1128 at 7 (hereinafter "Brief")) departs sharply from even the most deferential approaches to foreign law taken by the lower courts.[40]

Timberlane, which the Ninth Circuit properly applied below, is the most favorable rule for the defendants.[41]

[40] In *Mannington*, 595 F.2d at 1298 (3d Cir. 1979), the Third Circuit discussed extraterritorial jurisdiction under the Sherman Act and found "substantial agreement" with *Timberlane*, identifying ten factors to be considered in determining whether jurisdiction should be exercised. These factors are nearly coextensive with those in *Timberlane*. London defendants note that *Mannington*'s ninth factor, whether a ruling would be acceptable in our country if by a foreign nation, is not noted in *Timberlane*. London defendants argue that interference with American regulation of American markets by a British court would be poorly received here. Plaintiffs seek, and the Ninth Circuit envisioned, no interference with British regulation of the British reinsurance market. If the *Mannington* factors were to apply, the result would be the same.

[41] The London defendants themselves regard the *Timberlane* test as "the most enlightened application of principles of international

Although the *Timberlane* test has not been uniformly accepted, these courts' alternative tests give potential conflict with foreign laws even less weight than does *Timberlane*.[42] Under any of these standards, a district court could and should assert jurisdiction over the London defendants. To adopt a test giving overwhelming import to the potential conflicts with foreign laws would be to depart radically from settled law.

1. *The Ninth Circuit Gave Proper Weight To The Test Contained In The Foreign Trade Antitrust Improvement Act.*

The Ninth Circuit reasoned that the Foreign Trade Antitrust Improvement Act ("FTAIA")[43] requires a court

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law to questions of jurisdiction under U.S. economic regulations." Petition For A Writ of Certiorari of Merrett Underwriting Agency Management Limited, *et al.*, at 3.

[42] *See Laker Airways v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984); *National Bank v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981). The D.C. Circuit rejected interest balancing because it requires the politically-charged weighing of national interests. *Laker*, 731 F.2d at 948-51. Unlike *Insurance*, *Laker* involved an actual, direct conflict with British law. *Laker* analyzed arguments, similar to the London defendants', that American courts should defer to Britain's hostility to American antitrust laws by withholding jurisdiction. *Laker* recognized that this hostility shows a lack of comity on the part of British officials, stating "certainly our law has not departed so far from common sense that it is reversible error for a court not to capitulate to a foreign judgment based on a statute like the British Protection of Trading Interests Act, designed to prevent the court from resolving legitimate claims placed before it." *Id.* at 939. Rather, "from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act." *Id.*

The Second Circuit rejected *Timberlane* to build on the "fundamental effects test outlined by Judge Learned Hand" in *Alcoa*, and inquired primarily whether the "restraint has, or is intended to have, any anticompetitive effect on United States commerce." *National Bank v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981). The Seventh Circuit declined to apply *Timberlane* and rejected the argument that *Timberlane* vitiates *Alcoa's* effects test. *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1254 (7th Cir. 1980).

[43] 15 U.S.C. § 6a (The Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import

to determine whether the relevant conduct has a direct, substantial, and reasonably foreseeable effect on American commerce,[44] and, if so, to decline jurisdiction under *Timberlane* only in unusual cases. *See Insurance*, 938 F.2d at 932 (A-28). London defendants disagree. The Ninth Circuit, however, essentially agreed with the defendants' present assertion that the FTAIA leaves comity considerations unaffected. The court acknowledged that "*as the legislation does not eliminate comity*, a court should look to see if the case before it is one in which comity still has a role to play." *Id.* (A-28) (emphasis added). The court then conducted a thorough analysis of the comity issue in a careful consideration of the *Timberlane* factors.[45] This analysis was not unaffected by the district court's findings under the FTAIA or the FTAIA itself.

2. *The Ninth Circuit Gave Significant And Sufficient Weight To The Potential For Conflict With British Laws And Policy.*

Conflict is but one of several relevant factors. The Ninth Circuit considered five others: the parties' nationality, the efficacy of enforcement, the significance of effects in each country, the intent to harm American interests, and the foreseeability of American effects. *See Insurance*, 938 F.2d at 932-34 (A-29-31). The Ninth Circuit found that all of these factors favored American

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commerce) with foreign nations unless . . . such conduct has a direct, substantial, and reasonable foreseeable effect . . . on trade or commerce which is not trade or commerce with foreign nations").

[44] The district court concluded that the FTAIA did not shield these defendants from antitrust liability on these claims because the plaintiffs had alleged a direct, substantial, and reasonably foreseeable effect on American markets.

[45] London defendants note that the Ninth Circuit failed to consider the seventh *Timberlane* factor, the relative importance of conduct within the United States and conduct abroad to the violations charged. Consideration of this factor would not have changed the result. Even the district court found that, although these claims were based on foreign agreements, activities in the United States were significant.

jurisdiction and thus held that the district court's jurisdiction "must be exercised." *Id.* at 934 (A-31). London defendants argue that Judge Noonan was wrong because he did not hold that the potential for conflict with foreign laws outweighed all other factors.

In support of their contentions, defendants now proffer a detailed history of self-regulation and governmental regulation of the British reinsurance industry. All of this, however, is irrelevant because the Ninth Circuit concurred, in this regard, with the London defendants and the British Government, stating that the "district court found that *application* of the antitrust laws to the London reinsurance market 'would lead to significant conflict with English law and policy.' The British brief reiterates that conclusion; we do not doubt its accuracy." *Id.* at 933 (A-29) (quoting the court below) (citation omitted) (emphasis added).

In fact, no genuine conflict exists between United States and British law in this case. The London defendants make no suggestion that British law requires them to violate American law, that British law forbids what American law requires, or that compliance with American antitrust law would interfere with the conduct of their business in London or within the European Economic Community. They point to no inconsistency between American antitrust law and the United Kingdom's Competition Act of 1980 or Article 85(1) of the Treaty of Rome governing competitive practices in the EEC. The supposed conflict is in reality nothing more than a dispute about the propriety of subjecting British subjects to the jurisdiction of American courts.

The defendants remain unsatisfied because they would like the avoidance of conflict between American and British laws to be given even more weight. Nothing supports their position either in lower court decisions or in the voluminous scholarship regarding the comity issue. The London defendants have cited none. In today's global markets, such a radical departure from established law would eviscerate Congress's ability to regulate American markets. A nebulous concern that conflict with other nations' laws ought to be avoided cannot support such a legislative change in the reach of American law.

3. *The Ninth Circuit Properly Concluded That Other Timberlane Factors Outweigh Any Conflict With British Laws In This Case.*

Several other *Timberlane* factors favor the exercise of American jurisdiction. So held the Ninth Circuit. The London defendants disagree. The Ninth Circuit correctly decided that the nationalities of the parties favored American adjudication. All the plaintiffs in this case are either American citizens or American States. All the defendant foreign corporations do extensive business in American markets, and some are subsidiaries of American corporations. The London defendants instead make the completely unsupported assertion that "the comity issue should focus on the nationality of the parties against whom relief is sought." (Brief at 28.) Not even *Timberlane* reached this conclusion.

Applying *Timberlane*'s third factor (the extent to which enforcement by either state can be expected to achieve compliance), the Ninth Circuit found that effective relief in this case could be obtained through orders directed to American insurers (several of whom are parents of the foreign entities) and without reliance on the cooperation of British courts to enforce American court orders. Although no relief has yet been fashioned, the London defendants object to the Ninth Circuit's finding, speciously claiming that they will and must evade enforcement of American court decrees.

Of the *Timberlane* factors, three concern the effects of foreign conduct on the United States: the relative significance of effects on the United States as compared to those elsewhere; the extent to which there is explicit purpose to harm American commerce; and the foreseeability of such effect. *See Timberlane*, 549 F.2d at 614. All of these factors favor the assertion of jurisdiction. London defendants' conduct had its effect in the American primary insurance market, where certain forms of insur-

ance became either unavailable or prohibitively expensive. Plaintiffs have alleged that this was the London defendants' explicit purpose (even the defendants concede that this effect was foreseeable).

When three out of the seven *Timberlane* factors weigh heavily in favor of exerting jurisdiction, two weigh less heavily, and only one weighs against, a court should find that jurisdiction ought to be exercised. The London defendants are correct in describing the Ninth Circuit's decision as one "in which effects were determinative," (Brief at 29); but they are wrong in suggesting that it is "an incorrect decision." (*Id.*) The *Timberlane* and other tests mandate that domestic and foreign interests be *balanced*, not that potential conflicts with foreign laws be avoided at all costs. Adoption of the London defendants' position would result in state-sanctioned international cartelization. Even the European Community disagrees with their position. Recently, the Commissioner of the European Communities prohibited under European antitrust law an American cartel sanctioned by American law under the Webb-Pomerene Act from shipping soda ash into the members of the European Community, including Great Britain, under Article 85(1) of the EEC Treaty. *See*, Comm'n Decision of 19 December 1990, IV/33016—*Ansac*, 34 Official J. of the Euro. Communities, L 152, at 54 (15 June 1991).

D. Global Economic Integration Supports The Assertion Of Subject Matter Jurisdiction Over These Claims.

American markets operate within an increasingly integrated global economy. The interdependence of national economies makes it imperative for American courts to exercise jurisdiction over foreign actors in foreign countries when their actions threaten important domestic economic policies. Comity should be reserved for those situations in which the legitimate substantive laws of each nation impose conflicting obligations. The London defendants could readily obey the laws of both the United

States and of Britain by competing for American business.

In April, a British scholar noted that the "growing economic interdependence of nations, the scale of foreign operations of many companies, the emergence of global securities markets, the great rise in cross-border banking and the scope for rapid foreign transfer of assets or documents all mean that some extraterritorial reach of domestic law is essential if it is to remain effective." P.M. Roth, *Reasonable Extraterritoriality: Correcting the "Balance of Interests,"* 41 Int'l & Comp. L.Q. 245, 266-67 (1992). Moreover, he continued, "[c]onfronted with transactions and arrangements that are planned internationally, an attempt to control them by a regulatory framework that is rigidly confined within national boundaries is increasingly unrealistic. Indeed, *if the prescriptions of regulatory legislation cannot extend beyond territorial frontiers, cartelists would be encouraged to seek antitrust havens* from which to conduct their operations." *Id.* (emphasis added).

American courts must enforce Congress's economic regulations. Courts cannot abandon the important public policies underlying economic regulation, such as the Sherman Act, out of a nebulous concern that conflict with foreign law ought to be avoided. Comity would function as "a wall protecting private transactions from public regulations." J.R. Paul, *Comity In International Law*, 32 Harv. Int'l L.J. 1, 70 (1991). American courts must assert jurisdiction over all those who conspire illegally, in foreign nations, to violate American law and who intend or cause substantial effects on American domestic markets. Otherwise, the Sherman Act will be rendered ineffective. The decision of the Ninth Circuit should be affirmed.

CONCLUSION

The respondents respectfully request this Court to affirm the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on June 18, 1991.

Respectfully submitted,

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Nos. 91-1111 and 91-1128

In the

Supreme Court of the United States

October Term, 1992

HARTFORD FIRE INSURANCE CO., et al.,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, et al.,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT STATES IN NO. 91-1111

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QUESTIONS PRESENTED

1. Whether allegations that insurers' enlistment of reinsurers and others in agreements not to trade, as a means of compelling competitors to stop selling certain insurance products to American consumers, are sufficient to state a claim of "boycott, coercion or intimidation" within the meaning of section 3(b) of the McCarran-Ferguson Act.

2. Whether co-conspirators are liable for the antitrust injury that flows from conduct that is not regulated under section 2(b) of the McCarran-Ferguson Act.

3. Whether conduct regulated under section 2(b) of the McCarran-Ferguson Act loses its exemption when it is taken in furtherance of a conspiracy involving unregulated conduct.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT STATES IN NO. 91-1111

STATEMENT

These cases concern the antitrust consequences that flow from the private regulation of American insurance markets by foreign and domestic insurers and reinsurers operating outside

state regulatory authority or control.[1] Reduced to essentials, the complaints allege that defendant primary insurers enlisted reinsurers "to compel capitulation" by competing primary insurers to the defendants' demands. *See* Hartford A-22a.[2] This private cartel intended to limit the scope of insurance products sold in the United States, *id.*, permitting the primary insurers to avoid competition from companies that would otherwise provide more desirable insurance products to consumers. Manifestly, these cases are not about the wisdom, utility or legality of standardized forms of insurance coverage, Hartford Br. 2-3; nor are they about isolated and unrelated occurrences in foreign insurance markets. Merrett Br. at 3 and Sturge Br. at 4-5.

A. The Complaints.

The complaints allege that defendants Allstate Insurance Co., The Aetna Casualty and Surety Co., Hartford Fire Insurance Co. and CIGNA Corp. ("primary defendants") individually wanted to eliminate long-tail[3] and pollution insurance products from the commercial general liability ("CGL")

[1] These cases come before the Court on a record that has not been materially developed beyond the contours of the complaints. Defendants submitted the Affidavit of Carole Banfield ("Banfield Affidavit"), Joint Appendix at 113, in support of their McCarran-Ferguson Act motion. That affidavit was limited to uncontested details of the state regulatory systems, however. It did not address any of the market-related boycott activities that form the basis for the plaintiffs' claims for relief.

[2] This brief employs the following abbreviations: "JA" refers to the Joint Appendix; "Hartford A" refers to the Petition Appendix in No. 91-1111; "Hartford Br." refers to Brief for Petitioners in No. 91-1111; "Merrett Br." refers to Brief for Petitioners in No. 91-1128; and "Sturge Br." refers to Brief for Petitioner Sturge Reinsurance Syndicate Management Limited in No. 91-1128.

[3] Long-tail products cover risks for which claims may be filed many years after the occurrence giving rise to such claims. Conn. Compt. ¶ 4(v); Ca. Compt. ¶ 4(h).

insurance[4] market. Conn. Compt. ¶¶ 65 and 67; Ca. Compt. ¶¶ 61 and 63. Unilaterally discontinuing these products could have cost the four firms significant market share.[5] Thus, the primary defendants could not stop selling these products unless their competitors were also willing to forego these sales. *See, e.g.*, Conn. Compt. ¶¶ 68, 73 and 74; Ca. Compt. ¶¶ 64, 69 and 70.

Unable to obtain voluntary agreement from their competitors, the primary defendants began organizing the conspiracy to purge long-tail and pollution insurance products from the market. Conn. Compt. ¶¶ 66 *et seq.*; Ca. Compt. ¶¶ 63 *et seq.* To force all insurers to abandon these products, the primary defendants sought to control two critical inputs in the insurance industry: reinsurance and statistical support, both needed by competitors to underwrite policies profitably. Conn. Compt. ¶¶ 4(p), 48, 51-52, 103; Ca. Compt. ¶¶ 4(o), 39, 42-43, 99.

Reinsurance[6] is essential to insurance markets. *See* Conn. Compt. ¶¶ 4(p) and 73; Ca. Compt. ¶¶ 4(o) and 34. An insurer can greatly expand its capacity to insure various risks through the purchase of reinsurance. Conn. Compt. ¶ 4(p); Ca. Compt. ¶ 29. Lack of reinsurance would force even some of the largest companies to reduce sales drastically and chance the permanent loss of established clients. *Id.; see* 1 B. Webb, H.

[4] Commercial general liability insurance provides coverage against third-party claims for businesses and state and local governments. Conn. Compt. ¶ 4(a); Ca. Compt. ¶ 4(a).

[5] Defendants understood the nature of the marketing disadvantage they would face without competitor acquiescence. *See* David C. Sterling, Secretary at The Hartford Insurance Group, Monograph 9, "Environmental Impairment Liability: An Insurance Perspective," contained in *Issues in Insurance*, Vol. II, at 210 (E. Randall, ed., 4th ed., 1987) ("From a [seller's] standpoint, the selling of pollution liability insurance makes sense because the coverage can be used as a door opener for new business as well as for various target marketing opportunities.").

[6] Reinsurance is an agreement whereby one party (the reinsurer) agrees to reimburse another party (the insurer) for a designated portion of the risks underwritten by the insurer. Conn. Compt. ¶ 4(p).

Anderson, J. Cookman & P. Kensicki, *Principles of Reinsurance* 5 (1990).

Reinsurance transactions occur primarily in interstate and foreign commerce. As defendants acknowledge, "To meet the needs of domestic primary insurers, much reinsurance must be placed abroad." Hartford Br. 2. Reinsurance transactions are not, in any case, subject to state insurance regulation. Conn. Compt. ¶¶ 41(e) and 46; Ca. Compt. ¶¶ 37 and 49(e); *see* States' Reg. App. ¶ E, JA 226, 228, 234, 241, and 247.[7]

Statistical support services are also essential for marketing these insurance products. Conn. Compt. ¶ 103; Ca. Compt. ¶ 99. Using statistical data provided by a rating bureau, an underwriter can price a particular risk with a high

[7] Reinsurers have historically conducted their affairs subject to antitrust rules. N. David Thompson, president and chief executive officer of Defendant North American Reinsurance Corp., expressed this view in *Forum*, a publication of the American Bar Association:

> Reinsurers have generally conducted their operations free from the type of regulation to which primary insurers are subject in most jurisdictions. Reinsurance rates are not approved or filed. Reinsurance treaty provisions are not governed by statute or regulation, except for special matters such as the nearly universal solvency clause. . . . Thus, reinsurers have been outside the protections of the McCarran Act and so, at least, since the decision in the *South Eastern Underwriters* case, they are fully exposed to the enforcement of the antitrust laws, state as well as federal.

N. David Thompson, *Critical Issues of the Eighties: How Trends in Reinsurance Will Affect Legal, Legislative, and Regulatory Actions*, 16 Forum 1038, 1055 (1980-1981) (footnote omitted). *Accord*, C.F. Aldrich [president of Kemper Reinsurance Co.], "Regulation, Accounting, and Statistics," in R.W. Strain, *Reinsurance* 621 (1980) ("[R]einsurance has been traditionally subject to little, if any, specific state regulations of the type contemplated by the McCarran Act."); 1 J. Atwood and K. Brewster, *Antitrust and American Business Abroad* 78-79 (2d ed. 1981) ("[S]ince state insurance schemes do not, and could not, purport to regulate the bulk of international insurance transactions, the federal antitrust laws are fully applicable. This may be one area where the international nature of the transaction enhances antitrust risks.").

probability that, on average, premium income from that and similar risks will exceed claims. The underwriter's confidence in the price and the insurer's consequent willingness to write the policy depend upon the size of the statistical database available. This must be large enough to provide a credible appraisal of the risk in question.[8] *See id.*

Defendant Insurance Services Office, Inc. ("ISO") is the almost exclusive source of statistical support services in this country for CGL insurance. Conn. Compt. ¶ 4(e); Ca. Compt. ¶¶ 38-39. ISO has approximately 1,400 insurer members, including the four primary defendants. *Id.* By sharing the claims experience of its entire membership, ISO is able to provide a statistical database to its members that would be difficult for any single company to match. Conn. Compt. ¶ 103; Ca. Compt. ¶ 99. With the exception of the few very largest insurers, like the primary defendants, no individual insurer is capable of creating a database of its own that would be reliable for underwriting CGL policies. *See* Conn. Compt. ¶¶ 103-04; Ca. Compt. ¶¶ 99-100.

The complaints specifically allege that by December 1983, the four primary defendants had agreed to eliminate long-tail and pollution insurance entirely from the American market for CGL insurance. The then-voluntary ISO form revision process, begun in 1977, was close to completion and ISO was preparing to propose new CGL forms. Conn. Compt. ¶ 59; Ca. Compt. ¶ 55. Despite the primary defendants' objections, their competitors had approved new forms that retained long-tail and pollution coverage. Conn. Compt. ¶ 66; Ca. Compt. ¶ 62.[9] In March 1984, notwithstanding primary

[8] 2 B. Webb, J. Launie, W. Rokes & N. Gablini, *Insurance Company Operations*, 37-39 (1984). Contrary to defendants' unsupported factual statement that most long-tail risks are "unforeseeable . . . and hence not reflected in the underwriting decision or the premium charged," Hartford Br. 4, a fully developed factual record will show that the vast majority of long-tail risks are both foreseeable and reflected in underwriting decisions and the premiums charged.

[9] Defendants imply that the American CGL market can only support one standardized form. Hartford Br. 2-3. That inference is neither supported by the record, *see* Banfield Aff. ¶ 4, JA 114, nor consistent with

defendants' continued objections, ISO began filing with State regulators a revised occurrence form and a claims-made form, both of which included coverage for long-tail and pollution risks.[10] Conn. Compt. ¶¶ 60, 63-65; Ca. Compt. ¶¶ 56, 59-61. Although ISO believed substantial time would be needed for education of industry groups and for regulatory review of the new forms, in its cover letter to State regulators, it "propose[d] that the new forms become effective . . . . " Banfield Aff. Ex. D. at 42, Docket Entry 515.

Having failed to attain their goal through voluntary persuasion within ISO, the primary defendants turned to concerted, coercive enforcement efforts conducted outside the purview of state regulators to purge long-tail and pollution products from the American market. Beginning no later than March 1984, the primary defendants organized and entered into agreements with a reinsurance cartel to enforce their efforts to change the CGL market. Comprised of foreign and domestic reinsurers, the cartel was designed to change the CGL market by compelling the elimination of long-tail and

ISO's promulgation of two CGL forms, Conn. Compt. ¶ 60; Ca. Compt. ¶ 56. The standard text for the Chartered Property Casualty Underwriter professional designation course of the American Institute for Property and Liability Underwriters, 1 B. Webb, J. Launie, W. Rokes & N. Baglini, *Insurance Company Operations* 8 (1984), recognizes that "[m]any insurers use both [standard and non-standard] types of forms" for different risks. Many non-standard forms "deviate only slightly from standard forms." *Id.* at 6. However, this case is not about the existence or voluntary use of standardized forms. This case is about denying competitors access to reinsurance and statistical support for the particular insurance products against which defendants Hartford, Aetna, Allstate and CIGNA did not want to compete.

[10] Occurrence based insurance covers liability arising from any event that transpired during the policy period regardless of when a claim for such liability is filed. Conn. Compt. ¶¶ 4(m) and 61. Claims-made insurance only covers claims filed during the policy period regardless of when the liability event occurred. Conn. Compt. ¶¶ 4(a) and 61-62.

pollution insurance products. Conn. Compt. ¶¶ 67-81; Ca. Compt. ¶¶ 63-77.

Defendants first directed their attention to ISO. Conn. Compt. ¶¶ 67-86; Ca. Compt. ¶¶ 63-82. ISO members were told that if they did not eliminate long-tail and pollution products from ISO's proposed new forms, there would be no reinsurance. *Id.* The cartel's coercive threats to withhold reinsurance from the American market escalated from March through September, 1984. By September 20, 1984, the reinsurance lock-out had its intended effect. ISO capitulated and actively joined the conspiracy. Conn. Compt. ¶¶ 88-89; Ca. Compt. ¶¶ 84-85. The conspirators' forms eliminated pollution insurance coverage; their claims-made form eliminated long-tail coverage.[11] Conn. Compt. ¶ 88; Ca. Compt. ¶ 84.

Eliminating long-tail and pollution coverages from ISO's forms did not guarantee that non-conspiring primary insurers would refrain from selling these products that consumers desired. Continued use of the 1973 ISO CGL form or the use of special endorsements could still have provided pollution or long-tail coverage. Moreover, an occurrence form of coverage remained available.[12]

Before 1986, most CGL insurance in the United States was sold on the 1973 ISO CGL form, which included coverage for both long-tail and pollution risks. Conn. Compt. ¶¶ 4(l), 47, 56 and 57; Ca. Compt. ¶¶ 4(1), 38, 52 and 53. ISO's coerced adoption of the new forms, and the subsequent approval of those new forms by

[11] By incorporating into a claims-made policy a retroactive date, Conn. Compt. ¶ 4(q); Ca. Compt. ¶ 4(e), that is the same as the date of policy issuance or renewal, an insurer can limit coverage to circumstances in which both the liability event and claim filing must occur during the policy period. Conn. Compt. ¶ 63; Ca. Compt. ¶ 59. To eliminate long-tail risks from the market, defendants needed to promote the claims-made policy with retroactive date to the exclusion of all other products. Conn. Compt. ¶ 73; Ca. Compt. ¶ 69.

[12] While defendants succeeded in eliminating pollution from both the occurrence and claims-made forms and in inserting a retroactive date in the claims-made form, they did not succeed in forcing ISO to abandon the occurrence form entirely. Conn. Compt. ¶ 88; Ca. Compt. ¶ 84.

some of the states, did not remove the 1973 ISO CGL form from the market. Conn. Compt. ¶¶ 102-03; Ca. Compt. ¶¶ 98-99. Additionally, endorsements to the truncated ISO forms remained theoretically available for pollution and long-tail coverage. Banfield Aff. ¶ 15, JA 117-118. Defendants' further enforcement acts, however, guaranteed that neither the 1973 forms nor these endorsements could be used. Conn. Compt. ¶¶ 100 and 104; Ca. Compt. ¶¶ 96 and 100.

To ensure that competitors could not sell pollution or long-tail insurance products, primary defendants conspired with reinsurers to impose reinsurance cut-offs. Starting in 1984, contemporaneously with efforts directed at ISO, the reinsurer defendants, implementing their agreement with the primary defendants, began denying reinsurance to United States companies that chose to provide pollution insurance. Conn. Compt. ¶¶ 90-100; Ca. Compt. ¶¶ 86-96. By November 6, 1985, the otherwise competing foreign reinsurers agreed that all North American casualty reinsurance treaties, including coverage for CGL, would be written with a total pollution exclusion. Conn. Compt. ¶ 99; Ca. Compt. ¶ 95. As a consequence, pollution coverage evaporated from the CGL market. Conn. Compt. ¶ 100; Ca. Compt. ¶ 96.

In a related move, defendant reinsurers conspired with primary insurers to foreclose reinsurance support for companies providing long-tail insurance. Competitors of the primary defendants that continued to sell long-tail insurance would not receive reinsurance for it. Conn. Compt. ¶¶ 92-93; Ca. Compt. ¶¶ 88-89. Foreign reinsurers also imposed "sunset clauses" in reinsurance contracts. Conn. Compt. ¶¶ 94-96; Ca. Compt. ¶¶ 90-92. A "sunset clause" leaves an insurer "bare" if a long-tail risk develops after a designated period. No portion of the reinsurers' enforcement activity – whether threats or denials of reinsurance coverage, or their use of sunset clauses – was reviewed, approved, or otherwise regulated by any state. Conn. Compt. ¶ 46; Ca. Compt. ¶ 37.

As a result of defendants' manipulation of reinsurance, United States companies were effectively precluded from selling long-tail insurance and pollution insurance. That, in turn, foreclosed the possibility that the competitors of the

primary defendants could capitalize on the defendants' refusal to sell such insurance. *See* Conn. Compt. ¶¶ 4(p) and 100; Ca. Compt. ¶ 96; *see also supra* note 5. Even this success, however, did not end the defendants' enforcement acts.

The continued viability of the 1973 ISO CGL form prevented full realization of defendants' plan to force pollution and long-tail products from the market. Although lack of reinsurance would prevent competitors from selling these products in great quantities, competitors could still use the 1973 ISO CGL forms to sell them in limited amounts. Defendants, therefore, agreed to cut off statistical support for the 1973 form. Conn. Compt. ¶¶ 101-03; Ca. Compt. ¶¶ 97-99. Without statistical support, marketing coverages based on the 1973 form became, at best, imprudent. In short, the elimination of statistical support coerced insurers not to sell, and made consumers unable to purchase, long-tail and pollution insurance. *See* Conn. Compt. ¶¶ 103-04; Ca. Compt. ¶¶ 99-100.

After successfully forcing pollution products from the liability insurance market, defendants faced an additional problem. The unavailability of pollution coverage in liability policies might increase claims against property policies for pollution-related losses. Plaintiff's Proffered Facts at I, JA 251-52. To counter this prospect, reinsurer defendants entered into a written agreement to eliminate all pollution insurance products from the American market for property insurance. Entitled the "Non Marine London Market Agreement 1987," Conn. Compt. ¶ 111; Ca. Compt. ¶ 107, but signed by both American and British companies, this agreement pledges signatories to use their:

> best endeavors to ensure that all U.S.A. and Canadian exposed insurance/reinsurance business attaching on or after 1st January, 1987, will only be written where the original business includes a seepage and pollution exclusion wherever legal and applicable.

Conn. Compt. ¶ 112; Ca. Compt. ¶ 108.

This agreement, following the successful elimination of pollution coverage in the CGL market, accomplished the

conspirators' goal: the virtual elimination of all insurance products for pollution in the United States. Conn. Compt. ¶ 114; Ca. Compt. ¶ 110.[13]

By 1986, defendants had succeeded in deepening a North American insurance crisis in the market for long-tail and pollution coverage. The effects on American municipalities were particularly devastating and, as conceded by defendants, foreseeable. Hartford A-82a. As a direct result of defendants' collusive agreements, plaintiffs were unable to purchase insurance products they needed, or were forced to pay inflated prices for shrunken coverage.

B. Proceedings and Decisions Below.

This litigation began with the filing of complaints by eight states on March 22, 1988. Ten other states filed soon thereafter.[14] Before all of the complaints had been responded to by answer or other pleading, the trial court ordered the parties to "file and serve those motions which they believe are dispositive of any claim or issue in this litigation based on the facts alleged in the complaints and other information in their possession" so long as the motions could be resolved without raising any "disputable issues of . . . fact."[15] In accordance

[13] Various defendants also sought to restrict the availability of long-tail and pollution coverage by limiting the insurance coverage for excess and umbrella insurance. Conn. Compt. ¶¶ 105-09; Ca. Compt. ¶¶ 101-05. Excess and umbrella insurance are specialized forms of insurance that are not normally offered in the admitted (regulated) market. ISO, as the trade association for admitted insurers, plays no role in the non-admitted market. Nevertheless, at the direction of primary defendants and London reinsurers, ISO generated umbrella and excess forms for use in the unregulated, non-admitted market. These forms eliminated pollution insurance and constituted yet another coercive attempt by defendants to eliminate long-tail and pollution insurance entirely from the American market. *Id.*

[14] A nineteenth state filed its complaint in 1989.

[15] Pre-Trial Order No. 2, ¶ 3a, JA 103-04 ("Motions shall not be filed that turn on disputable issues of evidentiary fact."). Further, the trial court only permitted discovery insofar as it was relevant to those motions and was not likely to raise any disputable issues of fact. Pre-Trial Order No. 2, ¶ 5, JA 105 ("Such discovery shall be further limited to matters which are not expected to raise disputable issues of fact."). Not surprisingly, no discovery was actually conducted.

with this procedure, defendants filed various motions under Rules 12(b)(1) and (6) and in part under Rule 56 of the Federal Rules of Civil Procedure asserting that the claims in plaintiffs' complaints were barred in whole or in part by the McCarran-Ferguson Act, 15 U.S.C. §§ 1101-15, the state action doctrine, plaintiffs' lack of standing, lack of subject matter jurisdiction as to the foreign defendants, the doctrine of international comity, and the failure of some plaintiffs' complaints to adequately plead a conspiracy comprising all claims. After briefing and argument, the trial court found that plaintiffs had standing, Hartford A-67a, but proceeded to dismiss the complaints on each of the other grounds urged by the defendants.

The court of appeals unanimously reversed the trial court's dismissal of the complaints. The court of appeals ruled that defendants' withholding of critical inputs, such as reinsurance, from competitors to preclude them from writing long-tail and pollution insurance products constituted a boycott within the meaning of the McCarran-Ferguson Act. Hartford A-20a-22a. Additionally, the court held that the use of unregulated foreign reinsurers to enforce the exclusion of those products from the American market, as the complaints charged, was not shielded by the McCarran-Ferguson Act. Hartford A-20a, nor by the state action doctrine. Hartford A-26a. The court of appeals also affirmed plaintiffs' standing to sue. Hartford A-17a. Further, the court found that the foreign defendants, having targeted their conspiracy on the United States, were subject to the authority of United States courts, and that the doctrine of international comity did not foreclose the exercise of that jurisdiction. Hartford A-27a-32a. Finally, the court of appeals ruled that the trial court had erred in dismissing the count from some complaints charging an over-arching conspiracy among all defendants

without providing those plaintiffs any opportunity to amend their complaints to plead the relevant factual nexus between property and casualty insurance. Hartford A-27a.

Defendants timely filed petitions for rehearing and requests for rehearing *en banc*. These petitions and requests were denied, no judge of the circuit voting for rehearing.

C. Proceedings in This Court.

Various groups of defendants filed timely petitions for certiorari in this Court. Those petitions sought review of the McCarran-Ferguson Act and state action holdings of the court of appeals, No. 91-1111, the international comity holding of the court of appeals, No. 91-1128, and the antitrust standing holding of the court of appeals, Nos. 91-1131 and 1146. This Court's Order of October 5, 1992, JA 308, granted a writ of certiorari in No. 91-1111 only on two McCarran-Ferguson Act questions and in No. 91- 1128 on the international comity question. To date no rulings on the petitions in Nos. 91-1131 and 1146 have been made.

SUMMARY OF ARGUMENT

I. The court of appeals correctly found that defendants' agreements and acts to force competitor adherence to cartel decisions constitute "boycott, coercion or intimidation" within the meaning of the McCarran-Ferguson Act ("McCarran Act") and therefore are subject to judicial scrutiny under the antitrust laws. The test for a McCarran Act boycott is found in Sherman Act boycott cases. Sherman Act cases cannot be distilled to a single boycott test. Their hallmark, however, is enforcement conduct. It is the presence of enforcement conduct that distinguishes cooperative behavior, which is shielded from antitrust scrutiny by the McCarran Act, from coercive behavior, which is not.

Collective coercive conduct used as the means of eliminating competition or compelling obedience to cartel demands has long been considered a boycott. The court of appeals properly found, on the undeveloped factual record

before it, that defendants' conduct, as alleged in the complaints, falls well within this ordinary understanding of boycott. The complaints allege that defendants combined to compel competing insurers to sell only those insurance products approved by the cartel. The means of compulsion used included withholding reinsurance and statistical support services – both essential inputs for insurers. This enforcement conduct constitutes a conventional boycott as described in *St. Paul Fire & Marine Co. v. Barry*, 438 U.S. 531 (1978). The conduct is similar to that described in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), the acknowledged genesis of the boycott exception to the McCarran Act.

Defendants self-servingly describe the complaints as alleging only agreements on forms and *voluntary* adherence to those agreements. But this description omits all mention of allegations that defendants combined to *force* competitors to adhere to cartel demands. Defendants' case description, wrongly accepted by the district court and properly rejected by the court of appeals, cannot be reconciled with the well-pleaded facts in the complaints.

Further, nothing in the text or legislative history of the McCarran Act supports defendants' argument that boycotts are limited to absolute or discriminatory refusals to deal. Supreme Court cases are also to the contrary. It is the existence, and not the extent, of coercion that determines whether conduct constitutes "boycott, coercion or intimidation." Here, defendants' refusals to offer reinsurance and statistical support services were the means of eliminating competition from insurers that would otherwise sell competing coverage products, and constitute boycott, coercion or intimidation.

Subjecting defendants' conduct to antitrust review will not impair the necessary operations of the insurance industry. Applying antitrust scrutiny to agreements to prevent competitors from offering competing products in no way threatens the ability of primary insurers to confer with reinsurers about their own products, or to engage in other normal business activity. Indeed, in enacting the McCarran Act, Congress

distinguished precisely between voluntary agreements on policy terms – which are immunized if adequately regulated by the state – and combinations designed to force unwilling competitors to adhere to terms – which are not immune. Congress preserved antitrust scrutiny of the latter to prevent members of the insurance industry from installing with impunity a private system of government affording themselves great economic advantage without regard for the public good.

The conduct challenged in these cases is precisely the evil addressed by the McCarran Act's boycott provision. Defendants' enforcement conduct is subject to antitrust review in the federal courts.

II. Section 2(b) of the McCarran Act establishes a limited antitrust immunity for the business of insurance "to the extent" regulated by the states. Unregulated conduct does not qualify for McCarran immunity. The court of appeals correctly concluded that the challenged conduct of the London-based reinsurers is not regulated within the meaning of section 2(b) of the McCarran Act. Further, none of the reinsurers' relevant acts are regulated within the plain meaning of section 2(b) because state insurance laws do not reach their conduct. This unregulated conduct is subject to judicial scrutiny under the antitrust laws.

As a matter of mainstream conspiracy law, all conspirators are liable for the antitrust injuries that flow from conduct to which they agree. Since all conspirators in these cases agreed to reinsurers' unregulated conduct, all are liable for the antitrust injuries that this conduct creates. Any other ruling would nullify the plain language of the McCarran Act that exempts conduct only "to the extent" regulated by state law. Moreover, any other ruling would create a regulatory void, undercutting the "cooperative federalism" of the McCarran Act.

Application of established conspiracy law to defendants' conduct in these cases would strengthen state regulatory schemes by foreclosing opportunities to evade them. Far from impinging on state interests in regulating insurance activity, this rule would enable States to rely upon competition to supplement insurance regulation.

Conduct subject to antitrust scrutiny is not necessarily unlawful. Insurance entities should have no difficulty in discerning the difference between lawful agreements regarding the purchase of reinsurance and unlawful agreements to withhold reinsurance and other essential inputs from competitors.

III. When additional antitrust injury flows from regulated conduct alone, a separate question of McCarran Act immunity arises. Under analogous Supreme Court precedent, McCarran Act immunity is inapplicable where, as here, regulated conduct furthers an unlawful conspiracy that relies upon unregulated acts.

This Court has easily found the labor exemption from the antitrust laws inapplicable when nominally exempt agreements undercut the purpose of the exemption. The logic of the labor cases applies even more strongly in the insurance context. When insurers act jointly within the context of state-authorized processes, they act consistently not only with state law, but also with the purposes of the McCarran exemption. In the present cases, insurers and reinsurers entered into unregulated, anticompetitive agreements to impose cartel terms on competitors. In doing so, they moved beyond the ambit of state regulation and crossed the line drawn by the McCarran Act's exemption. All defendants' conduct should be subject to antitrust review.

ARGUMENT

I. THE COMPLAINTS, WHICH ALLEGE CONDUCT TO FORCE NON-CONSPIRING INSURERS TO ADHERE TO CARTEL TERMS, PLEAD "ACTS OR AGREEMENTS OF BOYCOTT, COERCION OR INTIMIDATION" WITHIN THE MEANING OF THE MCCARRAN-FERGUSON ACT.

Under the McCarran-Ferguson Act ("McCarran Act"), 15 U.S.C. §§ 1011-15, the federal courts retain the authority to scrutinize anticompetitive conduct within the insurance business when that conduct constitutes "boycott, coercion or intimidation". 15 U.S.C. § 1013(b). Without judicial review of this conduct, members of the insurance industry may with

impunity install a private system of government affording themselves great economic advantage without regard for the public good. *See, e.g.*, 91 Cong. Rec. 1480, 1485 (1945) (remarks of Senator O'Mahoney), JA 221-23, ¶¶ 13, 16.

The complaints allege just such an effort. Together, defendant insurers and reinsurers determined neither what the commercial general liability insurance market would bear, nor simply what terms and conditions they might offer to meet existing demand. Instead, defendants defined what insurance products they wanted to sell and then eliminated the means by which their competitors could sell alternatives.

The withholding of trade relations for the purpose of pressuring competitors to accede to cartel demands has long been considered a boycott. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978). Defendants' conduct is a boycott under this conventional definition. Far from simply standardizing the terms under which some insurance products could be offered, defendants combined to force competitors to adhere to their cartel's demands. By choking off access to reinsurance and statistical support, inputs essential for writing insurance, defendants foreclosed to competitors and consumers alike the opportunity to sell or buy insurance products other than those approved by the cartel.

The court of appeals properly found this enforcement conduct to be "boycott, coercion or intimidation" within the meaning of the McCarran Act. Its decision, well within the traditional understanding of boycott articulated by this Court, should be upheld.

A. The narrow antitrust exemption provided by the McCarran Act does not extend to boycott, coercion or intimidation.

Before *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944) ("*SEUA*"), the insurance industry enjoyed a blanket exemption from the federal antitrust laws. The exemption evaporated, however, when this Court decided that the business of insurance is interstate commerce. *Id.* at 553.

Congress then enacted the McCarran Act. Congress' primary purpose in doing so was to affirm the power of the states to tax and regulate the business of insurance, notwithstanding its delineation as interstate commerce. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 217-18 (1979). Legislating in the wake of *SEUA*, Congress also enacted the McCarran Act to redefine the contours of the antitrust exemption applicable to the insurance industry. *Royal Drug*, 440 U.S. at 218-19.

The antitrust exemption set out in the McCarran Act is, by its own terms, limited. Not all insurance industry conduct qualifies for the exemption.[16] Moreover, a "broad and unqualified" exception to the exemption makes the antitrust laws applicable to *any* act or agreement of boycott, coercion or intimidation. *Barry*, 438 U.S. at 549-50.

The McCarran Act thus embodies "a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws. . . . " *Royal Drug*, 440 U.S. at 220. The industry is afforded an antitrust exemption, but this exemption is limited by the plain meaning of the language Congress used to establish the exemption and to carve out an exception for "boycott, coercion, or intimidation."[17]

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[16] The McCarran Act exempts from antitrust scrutiny the business of insurance alone, and then only "to the extent" regulated by State law. 15 U.S.C. § 1012(b). As is shown in Part II of this argument, defendants fail even to qualify for this limited exemption because their conduct was not regulated by the states.

[17] Ordinary rules of statutory construction require that this limited exemption be "narrowly construed." *Royal Drug*, 440 U.S. at 231; *accord Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982). Faithful to these rules, every Supreme Court decision on McCarran in the last thirty years has circumscribed the reach of the exemption. *Id.* (narrowing the "business of insurance" test); *Royal Drug*, 440 U.S. 205 (narrowing the "business of insurance" test); *Barry*, 438 U.S. 531 (narrowing the exemption by broadly defining the boycott exception); *FTC v. Travelers Health Ass'n.*, 362 U.S. 293 (1960) (narrowing the state regulation test); *cf. SEC v. National Securities, Inc.*, 393 U.S. 453 (1969) (narrowing the "business of insurance" test).

The boycott exception states: "*Nothing* contained in [the McCarran Act] shall render the said Sherman Act inapplicable to *any* agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. § 1013(b) (emphasis added). No limiting language appears in the text. If the industry conduct is a boycott, or if it is coercive, or if it is intimidating, the McCarran Act does not shield it from antitrust review.

B. Defendants' conduct constitutes boycott, coercion or intimidation within the meaning of the McCarran Act.

1. At a minimum, the term boycott as used in the McCarran Act includes concerted refusals to deal designed to prevent firms from competing effectively and to force competitors to accede to cartel demands.

In the only instance in which it has construed the boycott exception in the McCarran Act, this Court relied on Sherman Act boycott cases, finding specifically that Congress intended the McCarran Act to be read in light of those cases. *Barry*, 438 U.S. at 541 (In enacting the McCarran boycott exception, "Congress . . . employed terminology that evokes a tradition of meaning, as elaborated in the body of decisions interpreting the Sherman Act. It may be assumed, in the absence of indications to the contrary, that Congress intended this language to be read in light of that tradition."). The test for a McCarran Act boycott is, therefore, found in Sherman Act cases.[18]

[18] In their opening brief, defendants entirely disregard this Court's holding in *Barry* that Sherman Act cases determine the meaning of "boycott, coercion or intimidation."

Sherman Act boycott cases cannot be distilled to a single boycott test. *Id.* at 541-43.[19] What they have in common, however, is collective coercive conduct used as the means of eliminating competition or compelling obedience to cartel demands.

Thus, conduct constituting private enforcement of industry rules and practices is a boycott. *Id.* at 548-49. On this point, the Court has been unanimous. *Compare* the majority ruling in *Barry, id.*, at 541 ("The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute, by withholding or enlisting others to withhold patronage or services from the target.") *with* the dissent in *Barry, id.* (Stewart, J. dissenting) ("[T]he 'boycott, coercion, or intimidation' provision is most fairly read as referring to . . . attempts by members of the insurance business to force other members to follow the industry's private rules and practices.")

Similarly, conduct designed to deprive competitors of an essential input or the means of effective competition is a boycott. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 294 (1985) (the term boycott includes "joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.' "); *see also Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Associated Press v. United States*, 326 U.S. 1 (1945).

When conspirators use concerted refusals to deal as the means of forcing others to conform competitive practices to conspiratorial dictates, the conduct has always been viewed as a boycott. *Barry*, 438 U.S. at 544-45. *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 431 (1990) (message of boycotting conduct is, "We will not do business until you do what we ask"); *Fashion Originator's*

[19] "[B]oycotts are not a unitary phenomenon" and there exists no single definition of the term. *Barry*, 438 U.S. at 543 (quoting P. Areeda, *Antitrust Analysis* 381 (2d ed. 1974)).

Guild v. FTC, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U.S. 600, 612-13 (1914); *In re Workers Comp. Ins. Antitrust Litig.*, 867 F.2d 1552 (8th Cir.), *cert. denied*, 492 U.S. 920 (1989).

Enforcement conduct is, therefore, the hallmark of a boycott. Enforcement conduct separates a boycott from a mere agreement to restrict output or to fix prices or other terms.[20] The distinction is between cooperation, on the one hand, and coercion, on the other. *Barry*, 438 U.S. at 549. The basis for this distinction is found in the very purpose of the boycott exception, which "was viewed by the Act's proponents as an important safeguard against the danger that insurance companies might take advantage of purely permissive state legislation to establish monopolies and enter into restrictive agreements *falling outside the realm of state-supervised cooperative action*." *Id.* at 547 (emphasis added).

Enforcement conduct is the "larger evil" Congress made subject to antitrust scrutiny. *Id.* at 547. Congress expected the antitrust laws to apply to coercive conduct and private systems of regulation. Defendants in these cases can expect no less.

2. The complaints allege concerted refusals to deal designed to prevent firms from competing effectively, to force competitors to accede to cartel decisions and to deny consumers access to particular products.

Plaintiffs have alleged conduct falling well within the ordinary meaning of boycott. The complaints allege that

[20] The exchange between the majority and dissent in *Barry* affirms this conclusion. The *Barry* dissent argued that reliance on Sherman Act cases to define McCarran Act boycotts would read section 3(b) too broadly. *Barry*, 438 U.S. at 556. The *Barry* majority rejected this argument, noting that not all Sherman Act violations are boycotts. *Barry*, 438 U.S. at 545 n.18. Among the non-boycott conduct is "price-fixing, in the absence of additional enforcement activity." *Id.* In other words, enforcement conduct is what distinguishes a mere price-fixing agreement from a boycott.

primary insurer defendants attempted to persuade their competitors to agree voluntarily to change the forms on which certain insurance was offered in order to limit competition for commercial general liability insurance. When primary insurer defendants were unable to get voluntary acquiescence, they forced capitulation. They enlisted reinsurers to withhold reinsurance, a key input needed by competing, non-conspiring primary insurers in United States markets. At the behest of the four primary defendants, the reinsurers conspired to refuse to deal with insurers in the United States who offered the insurance products primary insurers wanted to ban. The pressure created by defendants' concerted acts forced recalcitrant insurers to accede to the defendants' private demand – that all members of the industry stop selling the insurance products the cartel wanted to ban from the market.

Defendants further compelled compliance with their demand by withdrawing another critical input that recalcitrant insurers would need to compete effectively: statistical support for the products banned by the cartel. As a result, the boycotted insurers were unable to sell the banned products in the market, causing injury to consumers who wanted to buy them.

These allegations state a classic boycott. They describe concerted refusals to deal that had the purpose and effect of forcing nonconspiring insurers to acquiesce to cartel decisions and denying consumers access to desired insurance coverage. These refusals are indistinguishable from the conduct that was the acknowledged genesis of the boycott exception to the McCarran Act, the conduct described by this Court in *SEUA*, 322 U.S. at 535.

In *SEUA*, the conspirators fixed premiums. This conduct alone did not constitute a boycott. But the conspirators also acted to ensure that non-conspiring competitors adhered to the fixed prices. *Id.*[21] To that end, conspirators took a series

[21] Defendants are flatly wrong when they assert that the "object of the conspiracy [in *SEUA*] was to exclude all non-members from participating in this business." Hartford Br. 35. The object of the coercion was to "force non-member insurance companies into the conspiracies." *SEUA*,

of coercive steps, including the denial of reinsurance to insurers who refused to accept the conspirators' price terms. *Id.*[22] On the basis of this enforcement conduct, the Court found a boycott in *SEUA*.

Similarly, in these cases, defendants sought to fix the products to be sold in the primary insurance markets. Plaintiffs do not allege that voluntary agreements on fixed terms of coverage constitute a boycott. Conspirators, however, also acted to ensure that non-conspiring competitors adhered to the fixed terms. To that end, defendants took a series of coercive steps, including the denial of reinsurance for CGL and property insurance and withdrawal of statistical and rate-making support for excluded products. This enforcement conduct, precisely like the conduct in *SEUA*, is a classic boycott.

The complaints thus allege conduct that fits precisely within the "tradition of meaning" of a boycott. *Barry*, 438 U.S. at 541. They assert efforts by private firms to combine not only for product-fixing purposes, but also to coerce adherence to the agreement to use only the products so fixed. Even the 1944 National Association of Insurance Commissioners ("NAIC") Memorandum of Explanation on the McCarran Act understands this enforcement conduct to be subject to the antitrust laws. 90 Cong. Rec. A4407 (1944), JA 216-17, ¶ 2. ("No twilight zone is permitted, and where any group of insurers seek [sic] to act in concert to *enforce* so-called

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322 U.S. at 535. That is, the purpose was to require adherence to the agreement as to the price terms on which insurance would be sold.

[22] The witholding of reinsurance in *SEUA* was a "principal instrument utilized to compel adherence to private rate-fixing agreements. . . . [It was] used to coerce the companies directly. . . . The heavy club used by the board companies to police their rating agreements and to obtain adherence of competitors to such agreements is reinsurance." *Joint Hearing Before Subcomms. of the Committees on the Judiciary on S. 1362, et al.*, 78th Cong., 1st Sess., Part 2, 48 (1943) (testimony of Francis Biddle, Attorney General of the United States).

advisory rates, the antitrust laws will not be inapplicable.") (emphasis added.)[23]

Defendants cannot prevail on the law and so they seek to recast the facts. They "reduce" the allegations in the complaints to two sets of unrelated agreements – a horizontal agreement in which a group of primary insurers get together to develop standardized insurance policy forms and an entirely separate horizontal agreement in which reinsurers agree on the reinsurance to offer. Self-servingly, defendants describe additional conduct as voluntary adherence to those agreements. Hartford Br. 38. This description omits all mention of enforcement conduct, and cannot be reconciled with the well-pleaded facts in the complaints[24] or with the obligation to draw reasonable inferences in plaintiffs' favor at this early stage of the proceeding.[25]

Defendants must deny the interrelationship between the conduct of the primary insurers and reinsurers because that

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[23] "The views of the NAIC are particularly significant because the Act ultimately passed was based in large part on the NAIC bill." *Royal Drug*, 440 U.S. at 221 (citing 91 Cong. Rec. 483 (1945) (remarks of Senator O'Mahoney)).

[24] Defendants' Banfield Affidavit and State-by-State Appendix, portions of which are reproduced in the Joint Appendix at 113 - 215, are wholly irrelevant to the boycott issue. These documents merely provide information on the process for obtaining approval of policy forms in some states. They do not address defendants' acts of boycott: their threatened withholding of reinsurance, their actual withholding of reinsurance and their discontinuance of statistical support. Further, any suggestion in defendants' documents that plaintiff States disfavor competition in the sale of insurance is refuted by States' Regulatory Appendix which demonstrates, among other things, that states favor competition in the provision of insurance coverages. *See* JA 225 *et seq.*; *see also infra* note 53.

[25] This case remains in its procedural infancy. *See supra* notes 1 and 15 and accompanying text. The district court permitted no discovery of disputable facts; no discovery has been taken. *Id.* Moreover, the boycott issue now before this Court arises from a motion under Fed. R. Civ. P. 12(b)(6). *Id.* At this early stage in the proceeding, all reasonable inferences that defendants engaged in coercive conduct to force competitors to adhere

connection defeats their boycott argument. Only if new forms were developed and used voluntarily, without coercive interference, can defendants sustain the fiction that all of their conduct is reducible to mere agreements on terms. Only if the reinsurers acted in benign isolation from the cartel demands of the primary insurers can defendants support their contention that they innocently withdrew reinsurance and statistical support "in accordance with [their] protected agreements," Hartford Br. 38, and not, as alleged in the complaints, as an unlawful means of compelling competitor acquiescence.

This Court has long cautioned against viewing related conduct in isolation. *United States v. Patten*, 226 U.S. 525, 544 (1913) ("[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."); *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 707 (1962). Moreover, "[i]n cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after the scrutiny of each." *Id.*

The court of appeals refused defendants' invitation to reduce the allegations of the complaints and dismember them into separate parts.[26] Properly viewing the complaints as a whole, the Ninth Circuit found "much more" than a simple agreement on terms; it found enforcement conduct left unprotected by the exemption afforded the insurance industry under the McCarran Act. The court of appeals' boycott ruling, based on application of settled law to facts properly understood, should be upheld.

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to cartel demands must be drawn in the plaintiffs' favor. *Summit Health Ltd. v. Pinhas*, 111 S. Ct. 1842, 1845 (1991).

[26] Judge Noonan recounted the various activity undertaken by defendants and rejected defendants' contention that their conduct was not interrelated. Hartford A-21a. Thus, "Hartford and the other primary defendants . . . enlisted the reinsurers to compel capitulation by ISO and the insurers who refused to go along with the Hartford demands." Hartford A-22a.

3. Defendants' definition of boycott lacks support in the McCarran Act's text and legislative history and is contradicted by case law.

Defendants acknowledge that they engage in a boycott when they use enforcement activity to compel adherence to cartel demands. Hartford Br. 28-29. To avoid application of this rule to their own conduct, however, defendants redefine enforcement activity to exclude all coercive conduct except that constituting "absolute refusals to deal on any terms or discriminatory activity." Hartford Br. 31-32. This alluringly simple formula has no basis in the text or legislative history of the McCarran Act. Further, it is contradicted by case law which finds a boycott when a refusal to deal is neither absolute nor discriminatory.

As already shown, nothing in the text of the McCarran Act limits the phrase "boycott, coercion or intimidation."[27] 15 U.S.C. § 1013(b). Not only are "any" acts or agreements of boycott excepted from the antitrust exemption; "any" acts and agreements of coercion and intimidation are excepted as well. Yet defendants argue that the phrase is limited. They insist that the term does not reach all coercive marketplace activity, but only a small subset of that activity. In short, they argue that most coercion is not coercion for the purposes of the Act. But the "broad and unqualified" text of the Act devastates this argument. *Barry*, 438 U.S. at 549-50.

Like the text of the exception itself, the McCarran Act's legislative history refers to the boycott exception in broad and unqualified terms.[28] The McCarran Act preserves for antitrust scrutiny "*all* steps by which small groups have attempted to establish themselves in control in the great interstate and international business of insurance." *Id.* at 548 (emphasis added), citing 91 Cong. Rec. 1485 (1945) (remarks of Senator O'Mahoney), JA 223 ¶ 16. Nothing in the text or legislative

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[27] *See supra* pp. 16-18.

[28] Portions of the legislative history relevant to the scope of the McCarran Act's limited antitrust exemption are set out in JA 216-24.

history of the McCarran Act justifies limiting "boycott, coercion or intimidation," as defendants suggest, to a subset of its own terms.[29]

In all their prior briefs, defendants argued that only absolute refusals to deal qualify as boycotts. Defendants cite *Barry* as support for this notion. But defendants mistake the *Barry* Court's statement of facts for its holding. The *Barry* Court did not hold that an absolute refusal to deal is a necessary element of boycott, coercion or intimidation. It held that boycotts are not a unitary phenomenon and that efforts to force adherence to the terms of an agreement is a boycott. *Id.* at 543-45.

Apparently recognizing the numerous cases and substantial authority that find a boycott in the absence of an absolute refusal to deal,[30] defendants now acknowledge that an absolute refusal to deal is not "an invariable or talismanic element

[29] Precisely opposite defendants' notion,

> [t]here has never been any doubt . . . that private agreements by which these rates were *enforced* were violations and are violations of the antitrust laws. There is nothing in the conference report that relieves insurance companies from the prohibition of the antitrust law, because there has been written back into the bill language which was taken out by the House which would have exempted agreements from the prohibition of the antitrust law. Therefore *any* attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited by this provision.

91 Cong. Rec. 1480 (1945) (remarks of Senator O'Mahoney), JA 221-22, ¶ 13 (emphasis added).

[30] "[T]he large majority of cases have held that an absolute refusal to deal is not required to bring the conduct within [the McCarran Act boycott exemption]; a partial or conditional refusal to deal, if it is designed to coerce the target to conform to certain conduct, will still be deemed a 'boycott.' " 9 E. Kintner & J. Bauer, *Federal Antitrust Law* § 70.12 at 245-46. *See, e.g., FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458 (1986), in which this Court, citing *Barry*, found a boycott based on evidence of "a concerted refusal to deal on particular terms" whose purpose and effect was to force insurers to change their competitive behavior. *See also Northwest Wholesale Stationers*, 472 U.S. at 295 n.6 (recognizing that partial refusals to deal may have the same effects as absolute refusals to deal); *Virginia Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 484 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981); *Proctor v. State Farm Mut. Auto Ins. Co.*, 561 F.2d 262, 274-75 (D.C. Cir. 1977), *vacated on other grounds*, 440 U.S. 942 (1979); *In re Workers Comp. Ins. Antitrust Litig.*, 574 F. Supp. 525, 535 (D. Minn. 1983); *Trident Neuro-Imaging Lab. v. Blue Cross*, 568 F. Supp. 1474, 1479 (D.S.C. 1983); *Nurse Midwifery Assoc. v. Hibbett*, 549 F. Supp. 1185, 1191 (M.D. Tenn. 1982); *Workman v. State Farm Mut. Auto. Ins. Co.*, 520 F. Supp. 610, 623 (N.D. Cal. 1981); *Hoffman v. Delta Dental Plan of Minnesota*, 517 F. Supp. 564, 572 (D. Minn. 1981); *California League of Indep. Ins. Producers v. Aetna Cas. & Sur. Co.*, 179 F. Supp. 65, 66 (N.D. Cal. 1959).

of a boycott" but "merely a probative factor." Hartford Br. 32 n.14.[31] Further, defendants now redefine boycott to include both absolute refusals to deal and discriminatory refusals. Defendants cite not a single case that supports their still constricted definition. Supreme Court cases are to the contrary.

In *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), manufacturers of gas burners agreed on which products they wanted to sell. To force market adherence to this agreement, the manufacturers enlisted the aid of gas utilities, who agreed to provide natural gas only to customers who used a "certified" gas burner. The utilities were willing to deal on particular terms (only when certified burners were used) and in a non-discriminatory manner (all

[31] The *Barry* Court found the "absoluteness" of a refusal to deal to be a sufficient probative factor of a boycott where, as in that case, consumers were the target. Where, as in these cases, competitors rather than consumers are the direct target of the boycott, evidence of an absolute refusal to deal is not a necessary probative factor. *See* Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 12; *see also* 9 E. Kintner & J. Bauer, *Federal Antitrust Law*, § 70.12 at 245-46.

customers accepting the product limitation could purchase natural gas on equal terms). Nevertheless, their conduct constituted a boycott.

Similarly, in *United States v. General Motors*, 384 U.S. 127, 143 (1966), some dealers of General Motors cars agreed not to deal with discounters and "enlist[ed] the aid of General Motors" to enforce their agreement. General Motors agreed "to bring wayward dealers into line" by demanding adherence to the location clause common to all dealers' franchise contracts. Citing the same cases relied upon by the Court in *Barry*, the Court in *General Motors* found a boycott based on General Motors' refusal to deal, even though that refusal was neither absolute nor discriminatory. *General Motors*, 384 U.S. at 145-48. Where private entities combine to force recalcitrant competitors to acquiesce, a boycott has been alleged. *Id.*

Defendants in these cases acted no differently than did defendants in *Radiant Burners* and *General Motors*. Primary defendants, like the manufacturers in *Radiant Burners* and the dealers in *General Motors*, enlisted the aid of reinsurer defendants to bring recalcitrant competitors in line. Reinsurer defendants, like the utilities in *Radiant Burners* and the producer in *General Motors*, took the necessary steps to do so. There was no threat of an absolute refusal to deal or discrimination. There was simply enforcement conduct, withdrawal of reinsurance and statistical support, to ensure adherence to a private system of regulation erected to cripple competition.

Thus, it is the existence, and not the extent, of coercion that determines whether conduct constitutes "boycott, coercion or intimidation." Professors Areeda and Hovenkamp, reviewing the very cases now before this Court, confirm this conclusion:

> The Ninth Circuit [held] correctly that 'boycott' encompasses a conditional refusal to deal 'except on the terms demanded. The evil of a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms.'

P. Areeda and H. Hovenkamp, *Antitrust Law*, ¶ 210.2 at 124 (Supp. 1992).

As used in the McCarran Act, "boycott, coercion or intimidation" means enforcement activity designed to compel adherence to cartel demands. The Act does not distinguish between concerted conduct that, on the one hand, destroys competitors and concerted conduct that, on the other, forces competitors to obey the cartel's demands. It does not matter whether the enforcement mechanism is absolute or partial, discriminatory or evenhanded. What matters is whether private entities act in concert to force their economic will on others.[32] Defendants' refusals to offer reinsurance and statistical support, used as a means of eliminating competition from insurers that would otherwise persist in selling long-tail and pollution coverage, constitute boycott, coercion or intimidation.

C. ANTITRUST SCRUTINY OF DEFENDANTS' COERCIVE CONDUCT WILL NOT UPSET THE NECESSARY OPERATION OF THE INSURANCE INDUSTRY.

Defendants complain that shining the light of antitrust scrutiny on their conduct will impair the "historic and necessary" ability of insurers to confer with reinsurers and agree on the terms of primary insurance. Hartford Br. 40. But it is one thing for primary insurers to confer and agree with reinsurers as to terms of reinsurance for their own policies, and quite another to confer and agree on a course of action designed to prevent competitors from competing on their own terms.

[32] If a group of conspirators seek to eliminate competition from a single product offered by their competitors, they need go no further than withholding one essential component of that product. But under defendants' definition of boycott, this would not constitute a boycott. Defendants offer no defensible economic reason to distinguish between conditional, absolute and partial refusals to deal where, as here, competitors are the direct target of the boycott. No defensible distinction exists.

Applying antitrust scrutiny to the latter agreement in no way threatens the former.[33]

Defendants further claim that their conduct should be excused because policy form "standardization protects consumers and their agents and brokers from facing an unintelligible array of insurance forms. . . . " Hartford Br. 91-1111 at 3. But defendants went beyond mere product standardization; they engaged in enforcement conduct. Moreover, defendants fail to explain how antitrust review of their enforcement conduct would create the "unintelligible array" they fear.[34]

Congress enacted the boycott exception to leave "absolutely" unprotected "any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which is attempting to do business in the insurance industry in any way that was disapproved by them." 91 Cong. Rec. 1480 (1945) (remarks of Senator O'Mahoney), JA 221-22, ¶ 13.[35] In doing

[33] Moreover, reinsurance transactions are not likely to be inhibited by antitrust scrutiny at all. Reinsurers have historically conducted their affairs subject to antitrust rules. N. David Thompson, *Critical Issues of the Eighties: How Trends in Reinsurance Will Affect Legal, Legislative, and Regulatory Actions*, 16 Forum 1038, 1055 (1980-81). Mr. Thompson is president and chief executive officer of Defendant North American Reinsurance Corp. *See also* Havens & Theisen, *The Application of the United States and the EEC's Antitrust Laws to Reinsurance Pooling Arrangements*, 54 Antitrust L.J. 1299 (1986). *See also* references cited *supra* note 7.

[34] *See supra* note 9. In addition, it is the regulatory function of the states, not the private insurers, to protect consumers from incidental difficulties inherent in competitive markets.

[35] Defendants' only escape from antitrust scrutiny is to describe their conduct antiseptically as mere "implementation" of an agreement on terms. Hartford Br. 45. By this choice of words, defendants attempt, first, to divest their conduct of all coercive taint and, second, to bolster their claim that these cases are about nothing more than economic exigencies that are the "natural effect of" immunized, horizontal agreements on terms. *Id.* But the allegations in the complaint are not about unrelated ordinary-course-of business arrangements against which other insurers found it difficult or

so, Congress carefully distinguished voluntary agreements on policy terms – which could claim antitrust immunity if adequately regulated by the state – from combinations designed to force unwilling competitors to adhere to terms through the concerted denial of necessary trade relationships – which were expressly denied immunity. *Barry*, 438 U.S. at 547-50. The McCarran Act enables states to permit voluntary cooperative conduct, but it in no way authorizes coercive conduct.[36]

The ability of defendants to make unilateral decisions to withdraw reinsurance or statistical support is, finally, "beside the point." *General Motors*, 384 U.S. at 140. The point is that defendants engaged in a concerted process that "can by no stretch of the imagination be described as 'unilateral' or merely 'parallel'." *Id.* They acted jointly to eliminate the means by which competitors could persist in selling long-tail and pollution coverage. "What resulted was a fabric interwoven by many strands of joint action to eliminate [competitors] from participation in the market, to inhibit the free choice of [competitors] to select their own methods of trade and to provide multilateral surveillance and enforcement." *Id.*

The conduct challenged in these cases constitutes exactly the vice that the boycott exception sought to preclude. *Barry*, 438 U.S. at 548. Application of the antitrust laws to defendants' conduct would not undermine the purposes of the McCarran Act. To the contrary, it would give meaning to the safeguard provided by the Act's boycott provision. Defendants' enforcement conduct is subject to antitrust review.

expensive to compete. They are about the withdrawal of reinsurance and statistical support as the means of enforcing adherence to the demands of conspirators. As Judge Noonan correctly observed, "when 'the economic exigencies' are produced by conspirators who refuse to supply reinsurance if the unwilling insurer does not agree, a boycott is in effect and is being implemented." Hartford A-25a.

[36] While defendants cite legislative history attesting to the need for cooperative conduct in the business of insurance, defendants completely ignore the legislative history concerning the boycott exception. *See* JA 216-24 (reproducing relevant portions of the McCarran Act's legislative history).

II. REGARDLESS OF WHETHER IT CONSTITUTED BOYCOTT, COERCION OR INTIMIDATION, DEFENDANTS' CONDUCT IS SUBJECT TO ANTITRUST REVIEW BECAUSE IT IS NOT "REGULATED BY STATE LAW".

The Ninth Circuit found that the challenged conduct of the London-based reinsurers is not regulated within the meaning of section 2(b), and, therefore, not exempt from antitrust scrutiny.[37] These defendants are liable for all antitrust injury that flows from their unregulated conduct. Under established principles of conspiracy law, all co-conspirators are also liable for the antitrust injury that flows from the reinsurers' unregulated conduct. Thus, a second and alternative basis for exposing defendants' conduct to antitrust review is not, as defendants assert, that they have forfeited the exemption, but rather, that defendants' conduct was outside the scope of the exemption in the first instance.

A. The McCarran Act exempts only regulated conduct.

Section 2(b) of the McCarran Act, 15 U.S.C. § 1012(b), establishes a limited antitrust immunity for the business of insurance "to the extent" regulated by the States.[38] None of the reinsurers' relevant acts are regulated within the plain meaning of section 2(b) of the McCarran Act. Such regulation requires, *inter alia*, *both* a state insurance regulatory law purporting to regulate the particular activities at issue, *FTC v.*

[37] Defendants currently "believe" that "*all* of the defendants, foreign and domestic, are entitled to McCarran immunity . . . . " Hartford Br. 18 n.8. This belief is inconsistent with industry statements confirming that no reinsurer conduct is exempted from antitrust scrutiny under the McCarran Act. *See supra* note 7. The States contend that the conduct of *all* reinsurers directed at the North American market fails to qualify for the McCarran Act exemption.

[38] Ordinary rules of statutory construction require that this limited exemption be narrowly construed. *See supra* notes 16-17 and accompanying text.

National Casualty Co., 357 U.S. 560 (1958), *and* the means through which the state can assert direct control, within its own boundaries, over the regulated parties. *Compare id. with Travelers Health Ass'n v. FTC*, 298 F.2d 820, 823 (8th Cir. 1962), *on remand from* 362 U.S. 293, 297 (1960). In these cases, neither requirement is met.

State insurance regulatory laws do not purport to regulate the activities of the reinsurers in these cases. Indeed, N. David Thompson, the president and chief executive officer of defendant North American Reinsurance Corp. has admitted in a non-litigation context that reinsurance is not sufficiently regulated for McCarran Act exemption to apply.[39] N. David Thompson, *Critical Issues of the Eighties: How Trends in Reinsurance Will Affect Legal, Legislative, and Regulatory Actions*, 16 Forum 1038, 1055 (1980-1981). The 1989 American Bar Association Report of the Commission to Improve the Liability Insurance System, at 25, in examining this very issue, likewise concludes that reinsurance is effectively unregulated. *Accord*, Havens and Theisen, *The Application of United States and EEC Antitrust Laws to Reinsurance and Insurance Pooling Arrangements*, 54 Antitrust L.J. 1299, 1307-8 (1986).[40] Even in their own brief to this Court, Hartford Br. 6-8, defendants acknowledge that the focus of state

[39] The reasons for the limited reach of state regulation of international reinsurance transactions are apparent in legislative history of the McCarran Act previously relied on by this Court. *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 298-99, 302 (1960). At the time of the McCarran Act's passage, state insurance regulators were believed to have no jurisdiction over international insurance transactions. House Comm. on the Judiciary, *Expressing the Intent of the Congress with Reference to the Regulation of the Business of Insurance*, H.R. Rep. No. 143, 79th Cong., 1st Sess., at 3 (1945), *reprinted in* 1945 U.S. Code Cong. Serv. 670, 671-72; *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 452, 456 (1962); 1J. Atwood & K. Brewster, *Antitrust and American Business Abroad*, 78-79 (2d ed. 1981). Since that time, state insurance regulatory laws generally have not attempted to reach such transactions.

[40] Charles W. Havens, III is the former president of defendant Reinsurance Association of America.

insurance regulators lies not with reinsurance, but in the regulation of the policy relationship between direct insurers and business or individual consumers of insurance services.

Reinsurance contracts, unlike direct insurance policies, ordinarily need not be filed with state insurance departments for approval. The states do not regulate the sale of reinsurance in general or specifically with regard to form, type of product, conditions of sale or how and to whom sold. *See* States' Reg. App., JA 225-50, ¶ E. The rate-making statutes of some states, under which forms of coverage are reviewed expressly exclude reinsurance. *See, e.g.*, California's McBride-Grunsky Act, Cal. Ins. Code § 1851(a), JA 227, ¶ C; Conn. Gen. Stat. § 38-28, JA 234. The Unfair Insurance Practices Acts of many states do not apply to the foreign reinsurers' relevant conduct. *E.g.*, New York Ins. Law §§ 1101(b)(2), 2402(a), JA 247-49. In any event, they merely mimic the McCarran Act prohibition on boycotts, coercion or intimidation. This prohibitory language is not sufficient to constitute state regulation within the meaning of section 2(b). The record in these cases, including the published words of reinsurer defendants themselves, demonstrate that the conduct of the reinsurer defendants was not regulated by any state within the meaning of section 2(b), and remains subject to the federal antitrust laws.

The Ninth Circuit ruling found only the conduct of London-based defendants ineligible for the 2(b) exemption. While the States do not believe that this ruling was sufficiently inclusive of the conduct of all the reinsurers, it was certainly correct as to the conduct of the London-based defendants. Indeed, the record before this Court identifies not a single London-based reinsurer defendant that is licensed to engage or is engaged in the business of insurance in any of the relevant States. *Cf.* Sts. Reg. App., JA 225-50, ¶ E.

Moreover, under the holding of *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 298-302 (1960), even if the states had attempted to regulate the conduct of the London-based reinsurers, such attempts would not have constituted "state regulation" as that term is used in section 2(b). In *Travelers Health* this Court considered what Congress meant by the term "state regulation" in

section 2(b) and held that the term does not refer to state regulation of activities carried on beyond the borders of the regulating state. 362 U.S. at 298-302. Thus, conduct qualifies for section 2(b) immunity only when it occurs within the borders of the very state that is seeking to regulate it.

In these cases, the conduct of the London-based reinsurers occurred in some states, as well as abroad, but not sufficiently within the borders of any one state for a state's attempts at regulation to be considered "state regulation" for purposes of section 2(b). Under the plain meaning of section 2(b) of the McCarran Act, this conduct must remain subject to scrutiny under the antitrust laws. Any other conclusion would create a void, unintended by Congress, where private, anti-competitive conduct was neither regulated by the state nor subject to review under the federal antitrust laws.

B. Under established principles of conspiracy law, all conspirators are liable for antitrust injury flowing from the unregulated acts of their co-conspirators.

Under established principles of conspiracy law, all conspirators are responsible for the actions taken in furtherance of the conspiracy. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1940). All conspirators are liable under Section 1 of the Sherman Act when they adopt a " 'conscious commitment to a common scheme designed to achieve an unlawful objective.' " *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984) (citation omitted). This is true even if one of the conspirators otherwise enjoys an immunity from antitrust prosecution. *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965).

Thus, even though a union and its members have antitrust immunity when making wage agreements with multi-employer bargaining units, it is also the case that:

> a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the

> industry and the union is liable with the employers if it becomes a party to the conspiracy.

Id. at 665-66. In this sense, the labor exemption operates as an exemption for some, but not all, conduct of labor unions just as the McCarran Act grants an exemption for those entities engaged in the business of insurance to the extent such business conduct is regulated by the states.

Defendants try to avoid the obvious analogy between labor exemption cases and their conduct by claiming that the labor exemptions, unlike the McCarran Act, apply to entities rather than conduct. Hartford Br. 23. This argument is in error. The labor exemptions explicitly immunize conduct of labor unions and their members, and not the entities themselves. *See, e.g., Pennington*, 381 U.S. at 661-62 (Section "20 of the Clayton Act, 38 Stat. 738, [29 U.S.C. § 52] and § 4 of the Norris-LaGuardia Act, 47 Stat. 70, [29 U.S.C. § 103] permit a union, *acting* alone, to engage in the *conduct* therein specified without violating the Sherman Act.") (emphasis added); *see also, e.g.*, 29 U.S.C. § 52 (limiting injunctive relief against a union engaging in numerous activities such as peaceably assembling, persuading others by peaceful means); 29 U.S.C. § 103 (limiting injunctive relief against "yellow dog" contracts); 29 U.S.C. § 104 (limiting injunctive relief against unilateral or concerted conduct, including refusals to work, to assemble or to join a union). Various insurance *amici curiae* apparently accept this mainstream interpretation of the labor exemption.[41]

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[41] According to the Brief Amici Curiae of the National Association of Casualty & Surety Agents, *et al.*, at 13 ("NACSA Br.") (emphasis original):

> The labor union cases cited in . . . *Royal Drug* hold only that agreements with non-exempt entities lose the traditional labor-union immunity *if* they are not the kind of agreements that the exemption was intended to protect. Thus, it is "beyond question that a union may conclude a wage agreement with a multi-employer bargaining unit without violating the antitrust laws," and the immunity is not available only for *certain types of agreements* with non-exempt employers.

Even where an otherwise exempt labor union engages in conduct where the "goal is legal" and within the purview of the exemption, the union cannot claim exemption when the *means* used constitutes a "direct restraint on the business market [and] has substantial anticompetitive effects, both actual and potential, that would not flow naturally from the elimination of competition over wages and working conditions." *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 625 (1975).

Defendants' formulation of the issue before this Court erroneously presupposes that once an entity engages in exempt conduct, it is shielded from liability for antitrust injuries caused by *any* conduct to which it agrees. This formulation, if adopted, would transform the McCarran Act exemption into something it is not – an entity exemption. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979) (section 2(b) of the McCarran Act exempts the business of insurance from antitrust scrutiny, not the business of insurers). Defendants' formulation must be rejected, therefore, because it ignores settled conspiracy law making each of them liable for the antitrust injuries that flow from their joint agreement to engage in unregulated acts. *See Socony Vacuum Oil Co.*, 310 U.S. at 253-54.

Thus, the States do not seek a ruling in any way new to established conspiracy law. To the contrary, the States merely seek a ruling that the McCarran Act exemption does not extend to agreements between insurers and reinsurers pursuant to which reinsurers undertake unregulated conduct causing antitrust injury. Given the lack of state regulation of the reinsurers' conduct and their co-conspirators' participation in it, this ruling would not expose legitimate, regulated, joint action between such companies to antitrust scrutiny.

C. Defendants' expansive reading of section 2(b) of the McCarran Act threatens effective state regulation of the insurance industry.

Application of the federal antitrust laws to defendants' conduct would strengthen state regulatory schemes by foreclosing opportunities to evade them. State insurance regulators are aware of the potential for gaps between state

regulation and the application of federal law.[42] The plain language of the McCarran Act does not countenance such "gaps" and clearly applies federal law "to the extent" the states do not regulate the business of insurance. A contrary ruling would create a zone of conduct that is neither regulated by the states nor subject to the antitrust laws. Congress did not intend such a void.[43]

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[42] In recent Congressional hearings, state regulators have requested federal assistance in "filling the gaps in current state regulation." One such gap, it was noted, exists with respect to "alien reinsurers located outside the United States and not licensed anywhere in the United States . . . [s]ince a reinsurer does not have to be licensed in the state in which it does business . . . ". Specifically, representatives of the California, New York and Texas Departments of Insurance called for "federal registration/certification of offshore, alien insurance and reinsurance companies" together with "federal sanctions for violating those new requirements." Permanent Subcommittee on Investigations of the United States Senate Committee on Governmental Affairs, *Second Interim Report on the U.S. Government Efforts to Combat Fraud and Abuse in the Insurance Industry: Problems with the Regulation of the Insurance and Reinsurance Industry*, Senate Report 102-310, 102nd Cong., 2d Sess. (July 1, 1992), at 7, 8, 23-24.

[43] Some have argued that Congress fully intended section 2(b) to be interpreted consistently with this Court's decision in *Parker v. Brown*, 317 U.S. 341 (1943). *See, e.g.*, Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 Duke L.J. 587, 615-19 *et seq*. Although this issue need not be reached in order to reject petitioners' argument that the states "regulated" reinsurer conduct, it is a position with considerable support in the legislative history of the McCarran Act. The repeated references during the Senate debates to the requirement that the states "affirmatively," "specifically" and "adequately" regulate before the federal antitrust laws are displaced are fully consistent with a codified *Parker* doctrine interpretation. *Id.* The principal proponent of the compromise bill which ultimately passed, the National Association of Insurance Commissioners, *id.* at 593-95, stated that the McCarran Act "is based in a general way, upon . . . *Parker*." *Id.* at 617, *citing*, NAIC Memorandum of Explanation, *reprinted in* 90 Cong. Rec. A4407 (1944). Indeed, it would seem anomalous for this Court to conclude as it did in *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992), that the state regulation of title insurer search and examination fees was insufficient for "active supervision" yet the lack of *any* state review *under the same statute* of reinsurance boycotts was sufficient for McCarran Act purposes.

Far from intruding on state interests in policing regulated activity, this straightforward reading of the McCarran Act underscores the "cooperative federalism" which underlies much state insurance regulation. *Cf. FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992).[44] States have increasingly relied upon competition to supplement insurance regulation. The McCarran Act explicitly acknowledges the primacy of state regulation where states can and do regulate, even if a state's regulatory scheme has a profound, adverse effect on competition. Consistent with these same principles, the States ask no more than that this Court protect their right to rely on competition in insurance markets they choose not to regulate or cannot in fact regulate.[45]

Defendants ignore the plain language of the statute when they argue that because state regulators have authority to disapprove terms and conditions of primary insurance, they

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[44] For example, the rating bureau statute under which the title insurers in *Ticor* were licensed is the same statute under which petitioner ISO is licensed. *See, e.g.*, ch. 625, Wis. Stats. Wisconsin, and states with similar statutes, "presume" that the markets in which insurers make business decisions are competitive. "On the whole, the insurance market is fairly competitive and attention directed to making it more so will be more rewarding than effort directed to the regulation of particular rates." Wis. Stat. Ann. § 625.01.

[45] Additionally, the Act counsels that federal antitrust law is displaced only when state regulation would be "invalidated, impaired or superseded". 15 U.S.C. § 1012(b). *See also United States v. Crocker Nat'l Corp.*, 656 F.2d 428, 452-55 (9th Cir. 1981), *rev'd on other grounds sub nom, BankAmericard Corp. v. United States*, 462 U.S. 122 (1983); Weller, *supra* n.43, 1978 Duke L. J. at 602-06. There is no conflict between state regulation and the application of the federal antitrust law to the defendants' conduct in these cases. *Cf. Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

must also be held to have regulated the agreements to withhold reinsurance which "affected" those terms and conditions. Hartford Br. 17. Defendants cite no authority for this proposition.

Under the plain language of the McCarran Act, the antitrust laws are "applicable to the business of insurance *to the extent* that such business is not regulated by state law" 15 U.S.C. § 1012(b) (emphasis added). Defendants' approach nullifies the emphasized language and creates a regulatory void. Defendants would deem all conspiracies – no matter how substantial the effect and no matter how far beyond the purview of state regulators – regulated for purposes of the McCarran Act if states regulate, even unknowingly, some consequence of the conspiracy.[46]

Finally, defendants and their amici argue that under the ruling of the court of appeals, insurance companies would lose their McCarran Act immunity whenever they consult or participate with any unregulated entity in forms development and other "vital" activity. *See* Hartford Br. 19-22; NACSA Br. 6-9. In making this argument, defendants change the focus from the actual conduct challenged here – unregulated reinsurers' coercive withholding of reinsurance – to *all dealings with reinsurers*.[47] The focus in determining whether the "state

[46] Defendants' assumption that States can disapprove any insurance form "they determine to be the product of anti-competitive practices" is also unwarranted. *See* Hartford Br. 17. States cannot adequately assess the conduct of reinsurers that are outside their jurisdiction. The requirement of state regulation for section 2(b) purposes cannot be satisfied unless a state has the means to assert direct control, within its own boundaries, over the party engaging in the challenged conduct. *See Travelers Health Ass'n v. FTC*, 298 F.2d 820, 823 (8th Cir. 1962) *on remand from* 362 U.S. 293, 297 (1960).

[47] When defendants do specify conduct, they mischaracterize the conduct as the domestic insurers' participation in "joint activity with foreign reinsurers to establish terms and conditions of insurance". Hartford Br. 15. Similarly, amici mischaracterize the challenged practice as "the manner in which an advisory organization formulates advisory policy forms." NACSA Br. 8.

regulation" requirement is met, however, belongs on the "particular activities at issue" rather than on some generalized category of conduct. *See* Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 9.

The Ninth Circuit ruling means only that the antitrust laws are applicable to agreements to engage in the *unregulated* business of insurance. An insurance company's discussions and agreements with "consumer groups, corporate risk managers, and policyholder representatives," Hartford Br. 21, are regulated. Hence, such dealings would retain their McCarran Act exemption under the Ninth Circuit's ruling. Contrary to defendants' argument, insurers need not abandon all "state-authorized" agreements. Insurers need only abandon unauthorized, unregulated agreements with reinsurers for reinsurers to engage in anticompetitive acts that cause antitrust injury to American consumers.

In any event, the unavailability of the McCarran Act exemption does not automatically impose antitrust liability on insurers for joint conduct with reinsurers. If an insurer has no exemption with respect to certain conduct, that conduct simply becomes subject to antitrust scrutiny, not necessarily antitrust liability.[48]

Most companies have no trouble discerning the difference between lawful agreements regarding the supply of important inputs and unlawful agreements to deny competitors such inputs unless the competitors accept particular terms of doing business. The court of appeals' decision leaves insurers free to purchase reinsurance but properly warns them against using such arrangements as exclusionary devices directed against competitors.

[48] Agreements between insurers and reinsurers are akin to purchase and sale agreements between vertically related firms in any other industry. Reinsurance is an input into insurance, the finished product. An insurer purchasing reinsurance is simply securing an input into the finished product. That type of transaction is ordinarily not an antitrust violation.

III. BECAUSE THE INSURERS PARTICIPATED IN A NON-EXEMPT CONSPIRACY, THE ANTITRUST LAWS APPLY TO ALL CONDUCT IN FURTHERANCE OF THAT UNLAWFUL CONSPIRACY.

As discussed above, the insurers can be held liable as co-conspirators for any antitrust injury caused by the reinsurers' anticompetitive acts. A separate question is presented when additional antitrust injury flows independently from the insurers' regulated conduct in furtherance of the otherwise unlawful conspiracy. As to such additional antitrust injury, the McCarran Act exemption is inapplicable because that regulated conduct both furthered the conspiracy and relied upon unregulated conduct. Loss of the McCarran exemption for acts in furtherance of an otherwise non-exempt conspiracy is wholly consistent with this Court's general principles of antitrust liability. "[I]t is well settled that acts which are in themselves legal lose that character when they become constituent elements in an unlawful scheme." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962).

When nominally exempt conduct furthers a non-exempt conspiracy, this Court has consistently held that the exemption is inapplicable to the specific conduct in furtherance of the unlawful conspiracy.[49] *See, e.g.*, *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 625 (1975); *United Mine Workers v. Pennington*, 381 U.S. 657, 662 (1965); *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 807-08 (1945). *See also Case-Swayne Co.v. Sunkist Growers*, 389 U.S. 384, 394 (1967); *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816, 827-29 (1978).

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[49] When an entity commingles exempt and non-exempt conduct, the term "forfeiture" accurately describes the *loss* of the exemption for the otherwise exempt conduct. On occasion this Court has used the term "forfeiture" also to describe the *inapplicability* of the exemption to nominally exempt conduct undertaken in furtherance of a non-exempt agreement. *See, e.g.*, *United Mine Workers v. Pennington*, 381 U.S. 657, 665-66 (1965).

Even in those cases where, unlike here, the *only* conduct of a party would nominally qualify for exemption, the exemption is inapplicable if that conduct is taken in furtherance of a non-exempt agreement. *See, e.g.*, *Allen Bradley*, 325 U.S. at 799-800, 807-08 (defendant union had entered into nominally exempt collective bargaining agreements obligating local contractors to purchase electrical equipment only from local manufacturers with closed shops). This Court has easily found the labor exemption inapplicable when nominally exempt collective bargaining agreements undercut the purpose of the exemption – to allow unions to exercise independent judgment with respect to their bargaining policy. *Pennington*, 381 U.S. at 667-68.

The logic of the labor cases applies even more strongly in the context of McCarran Act immunity. *See Royal Drug*, 440 U.S. at 231 (citing labor and agricultural cooperative exemption cases in discussing McCarran Act "business of insurance" exemption).[50] When ISO and its members act jointly within the context of the state-authorized forms development process, they act consistently with the purposes of the McCarran Act exemption and state laws governing forms development. In this process, each competitor is free to bring its unique, competitive perspective to the forms development process authorized by state law. When insurers and reinsurers enter into unregulated, anticompetitive agreements to impose cartel terms, they move beyond the ambit of state regulation, crossing the line drawn by the McCarran Act's exemption.[51]

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[50] Agricultural cooperatives, normally immune from antitrust liability under the Capper-Volstead Act, 7 U.S.C. § 291, forfeit that immunity when acting in concert with entities not entitled to such protection. *Royal Drug*, 440 U.S. at 231, citing *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967); *United States v. Borden Co.*, 308 U.S. 188 (1939). When nominally exempt parties conspire with entities outside the intended *class* of those protected, these parties, in limited sense, act outside the intended scope of *conduct* protected by the Capper-Volstead Act.

[51] In *Allen Bradley*, this Court flatly rejected the argument that exempt conduct taken in furtherance of a non-exempt conspiracy ought to be permitted because of any perceived difficulty in drawing lines between

In the present cases, the voluntary, cooperative forms-development process contemplated by state law, *see, e.g.*, Conn. Gen. Stat. § 38-201j(b)(6), JA 230, yielded forms which the primary defendants opposed. Defendants then reached agreement with the unregulated reinsurers to directly impose the cartel's decision on an unwilling market. In addition, the primary defendants and their London-based co-conspirators targeted participants in the ISO process who had decided, prior to the infusion of the unregulated conduct, not to dismantle the forms and support services so essential to providing insurance products to the domestic market.[52] *Cf. Allied Tube & Conduit Corp v. Indian Head, Inc.*, 486 U.S. 492, 503 (1988) (coercive commercial conduct within the context of a voluntary product standardization process not immune merely because it is intended to influence governmental action).

The very purpose of state regulation and, hence, McCarran immunity, was defeated by defendants' conduct. When an

permissible and prohibited activities. *Id.* at 811. The Court stated that it could draw a line "with assurance" that any nominally exempt conduct would not be exempt where such conduct furthered an unlawful conspiracy. *Id.* The Court can draw a line in the McCarran Act context with even greater assurance because the nominally exempt conduct was in furtherance of an unregulated and, hence, non-exempt agreement. In the labor law context, there is no "state regulation" line and, hence, the Court has found it necessary to review the collective bargaining agreement in question. *See, e.g., id.*

[52] It would be equally objectionable if the unregulated conduct constituted "boycott, coercion or intimidation" or a different antitrust violation. For example, the exemption would be inapplicable where reinsurers agreed to price discriminate in favor of ISO members who, in exchange, agreed to switch their votes on a crucial ISO issue. Standard treaty or facultative reinsurance agreements would not, of course, be affected at all by such a holding because they do not constitute antitrust violations and because they do not call for conduct by insurers in furtherance of an otherwise unlawful agreement. *See generally* 1 B. Webb, J. Launie, W. Rokes & N. Baglini, *Insurance Company Operations*, 321-66 (1984).

insurer enters into an unregulated agreement, its incentives are altered in a way that will not be apparent to the regulators who review, at most, the end product of the joint activity. Thus, unregulated agreements undercut the very premise of competition underlying state regulation of the insurance industry. St. Reg. App., JA 225-50[53]; *see also*, *Ticor*, 112 S. Ct. at 2178.[54]

When Congress granted the states permissive power to regulate the insurance industry, it did not at the same time empower members of that industry to engage in joint conduct to impose their anticompetitive interests on each other or on the market as a whole. Members of the insurance industry may not install a private system through which they write their own regulations, adhere to them, and force others to do the same. Whether defendants engage in acts of boycott, coercion or intimidation, or otherwise involve themselves in unregulated reinsurance conduct, they subvert the operation of state regulation and engage in behavior outside the McCarran Act. Failure to apply the antitrust laws to this conduct would undercut the States' preference for competition in the insurance industry, would contradict the plain language of the McCarran Act, and would undermine Congressional intent in enacting that law.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

[53] The States' Regulatory Appendix includes for each state a section titled "[state] statutes express an overall policy disfavoring collusion and favoring competition in the provision of insurance coverages." *See, e.g.*, JA 226, 229, 237 and 243.

[54] Review of a form is not regulation of the use of that form. *See* States' Reg. App., JA 225-50, ¶ E. *See supra* n.46.

DATED this 23rd day of December, 1992

Respectfully submitted,

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Nos. 91-1111 and 91-1128

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., et al.,
Petitioners,
vs.
STATE OF CALIFORNIA, et al.,
Respondents.

MERRETT UNDERWRITING AGENCY
MANAGEMENT LIMITED, et al.,
Petitioners,
vs.
STATE OF CALIFORNIA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED IN NO. 91-1128

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January 22, 1993

STATEMENT PURSUANT TO RULE 29.1

Sturge Reinsurance Syndicate Management Limited, successor in interest to Oxford Syndicate Management Ltd. (also sued herein as K.F. Alder & Others (U.A.) Ltd.), is wholly owned by Sturge Group PLC.

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REPLY BRIEF FOR PETITIONER STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED IN NO. 91-1128

Petitioner Sturge Reinsurance Syndicate Management Limited, successor in interest to Oxford Syndicate Management Ltd. (also sued herein as K.F. Alder & Others (U.A.) Ltd.) (hereinafter referred to as "K.F. Alder"), respectfully submits this reply brief on the merits in Petition No. 91-1128.

In their briefs, the plaintiffs continue, without justification, to treat all of the British defendants as identical and interchangeable.[1] Nowhere in their briefs do the plaintiffs separately address the propriety of asserting subject matter jurisdiction over the claims against K.F. Alder. K.F. Alder has submitted a separate brief to this Court precisely because the allegations and claims against it are far narrower than those against certain other foreign defendants (including foreign reinsurers), and provide no justification for subjecting K.F. Alder to the United States antitrust laws.[2]

1. The British defendants include individual Lloyd's of London ("Lloyd's") underwriters, independent syndicates of underwriters at Lloyd's, London insurance companies ("London Market Companies") and Lloyd's and London market brokers. Although the plaintiffs admit that each individual defendant, each syndicate at Lloyd's and each of the London Market Companies is a separate and independent entity, they nevertheless conveniently ignore this fact for the purposes of this motion. JA-11, 13-17 (Cal. Compl. ¶¶ 4(t), (v), 12-23, 31); JA-61-71 (Conn. Compl. ¶¶ 4(h), (u), 6-37). (Numbers following the letters "JA" denote reference to the Joint Appendix.)

2. The plaintiffs offer no support for their attempt to use the claims and allegations against other defendants to support jurisdiction over K.F. Alder. Only the state plaintiffs (the "States") have even attempted to justify their position. However, the only case cited by the States, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), is inappositive. *Continental Ore* held that in calculating damages for an antitrust violation the jury may consider all aspects of the entire conspiracy. *Id.* at 699. Nor do the States gain any support for their position from their reference to the Hartford petitioners' observation that "'[p]rimary insurers and reinsurers are uniquely intertwined and interdependent.'" Brief for Respondent States in No. 91-1128, dated December 23, 1992 ("States Brief") at 18. Again, the States presume an identity of interest among all insurers and reinsurers. Whether or not K.F. Alder would agree with the Hartford petitioners' characterization, K.F. Alder is not alleged to have conspired with any primary insurers in the claims before this Court. Actions allegedly taken in furtherance of (continued...)

ARGUMENT

I.

THERE IS NO JURISDICTION OVER THE CLAIMS AGAINST K.F. ALDER

In this case of first impression, K.F. Alder asks this Court to consider the appropriate limits to the jurisdictional reach of United States antitrust law. K.F. Alder does not dispute that United States antitrust law, under certain circumstances, extends to conduct and actors outside the United States. However, in cases of legitimate extraterritorial application of United States antitrust law to wholly foreign actors, at least three factors have been present: (1) the conduct challenged has been a consensus wrong, that is, a targeted cartel or a coercive boycott (or both combined); (2) the challenged conduct has been implemented in the United States; and (3) the defendants have been the prime actors at the core of the conspiracy. Not one of these factors is present in this case.

While it could be argued that each one of the above elements should be a necessary condition to extraterritorial jurisdiction, the absence of all three factors must define the limits to legitimacy.[3]

2.(...continued)
any conspiracy in which K.F. Alder is not alleged to have joined cannot justify an assertion of jurisdiction over the claims that name K.F. Alder.

3. In the absence of these three factors, the exercise of extraterritorial jurisdiction would violate the principle of proportionality. According to the principle of proportionality, which is a principle of constitutional dimension in the European Community, no measure may be taken or jurisdiction entertained where the burden it imposes is excessive in view of its objectives. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr - Und Vorratsstelle Fur Getreide Und Futtermittel*, [1970] E.C.R. 1125. As to K.F. Alder, the burden would be excessive in view (continued...)

There are consensus wrongs that victim nations should have some scope to regulate, but there are also consensus economic freedoms to engage in transactions that are efficient and progressive. A nation and its citizens must be allowed wide scope for defining such transactions, lest we clog another nation's markets, impose unfair and costly burdens on firms and people from other cultures who could have no notice of a wrong, and generally interfere with the efficient flow of goods and services in the world. *Cf. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) ("American antitrust laws do not regulate the competitive conditions of other nations' economies."). Thus, economics, fairness and respect for other nations should counsel this Court to declare a limiting principle on extraterritorial jurisdiction. Indeed, there is a compelling need to constrain the reach of a nation's laws in order to legitimate expansive jurisdiction where necessary to deal with consensus wrongs. Under such a limiting principle, a defendant such as K.F. Alder who fails to satisfy each of the three jurisdictional prerequisites is beyond the reach of United States antitrust law.

A. K.F. Alder Is Not Alleged To Have Engaged In Any Coercive Conduct

This is an action challenging a purported boycott: an alleged effort of insurers and reinsurers to withhold insurance coverage in order to coerce other insurers to stop offering pollution and long-

3.(...continued)

of the justifications, and assertion of jurisdiction would therefore violate the fundamental right of proportionality.

tail coverage.[4] *See* States Brief at 5-7; Brief for Respondents (Private Party Plaintiffs) ("Private Party Plaintiffs' Brief") at 39-41. Coercive boycotts by firms with market power are illegal under United States law, and coercive boycotts targeted at Americans even by foreign actors are normally within United States subject matter jurisdiction and subject to the exercise of that jurisdiction unless comity counsels otherwise. Indeed, a long reach of jurisdiction may be required to protect a nation against consensus and egregious wrongs such as coercive cartels. But that is not this case. In this case, K.F. Alder is not alleged to have engaged in any coercive conduct or to have committed any consensus wrong.

The claims against K.F. Alder, unlike other claims in the complaint, do not allege any coercive conduct. JA-45-46 (Cal. Compl. ¶¶ 136-40); JA-94-97 (Conn. Compl. ¶¶ 130-39). The Sixth Count of the California Complaint alleges that in effectuating a purported conspiracy the British defendants:

> (a) conduct[ed] meetings and discussions among themselves to agree on the exclusive terms under which they would reinsure North American CGL risks;
>
> (b) agree[d] to exclude from all casualty treaty reinsurance written in London all pollution coverage for North American risks.

4. For example, in explaining their case for extraterritorial jurisdiction, the States assert: "The Reinsurers withheld reinsurance, an essential input of American primary insurance, from American insurers in order to compel them not to offer coverage in American insurance markets." States Brief at 5 (emphasis deleted).

JA-46 (Cal. Compl. ¶¶ 139(a), (b)); *see also* JA-95 (Conn. Compl. ¶ 133).[5] This is obviously not a boycott claim, and it is not a claim of a cartel (*i.e.*, a naked agreement to override the market). Rather, it is a description of cooperative behavior among firms that jointly insure risks as to the scope of the risks they will insure. The allegation is that certain underwriters set limits on the scope of their joint product and that the limits excluded pollution coverage. The plaintiffs admit that the reinsurers entered into the alleged agreements "in order to simultaneously reduce financial exposure to such risks and to increase underwriting profits therefrom." JA-

5. The California and other first wave complaints include only one claim (Count 6) against K.F. Alder and do not allege any conduct that can properly be characterized as a boycott. JA-45-46 (Cal. Compl. ¶¶ 136-40); *see* JA-94-97 (Conn. Compl. ¶¶ 130-39). In apparent recognition of the inability of such a claim to sustain subject matter jurisdiction with respect to K.F. Alder, the second wave complaints name K.F. Alder in two additional claims without adding a single factual allegation against K.F. Alder. JA-88-90, 95-97 (Conn. Compl. ¶¶ 115-19, 135-39). The first "new" claim for "global conspiracy" was dismissed by both courts below because it failed to allege how the separate conspiracies allegedly became a single global conspiracy. A-64-65; A-26-27. (Numbers following the letter "A" denote reference to the Appendix to the Petition for Certiorari in No. 91-1128.) The "global conspiracy" claim is not before this Court. The second "new" claim against K.F. Alder (Count 5 of the Connecticut Complaint) specifically alleges a boycott without adding to the single factual allegation that forms the basis for Count 6 in the California Complaint. JA-96 (Conn. Compl. ¶ 138(b)). However, the second round plaintiffs cannot change the true nature of their noncoercive claim (Count 6 of the California Complaint) simply by alleging a boycott without any factual allegations to substantiate the conclusory label. *See, e.g.*, *Kramer v. Secretary, United States Dept. of Army*, 653 F.2d 726, 729 (2d Cir. 1980) (court must "look[] beyond the label to the facts alleged" in reviewing a complaint); *Hinton v. Hinton*, 436 F.2d 211, 212 (D.C. Cir. 1970) (same), *aff'd*, 492 F.2d 669 (D.C. Cir. 1974). The allegations against K.F. Alder do not assert any coercive conduct which could support this claim, and plaintiffs cannot change the nature of the acts by attaching the label "boycott" to them.

89 (Conn. Compl. ¶ 117). The District Court credited the plaintiffs' characterization and explicitly found that the agreements had a legitimate business purpose. A-76-77. *See* A-68 ("negotiations over the terms and conditions on which risks will be accepted and insured are integral to the functioning of the [London reinsurance] market").

Plaintiffs' only specific conduct allegation against K.F. Alder confirms that K.F. Alder has been joined only as a joint venturer. As to K.F. Alder, the plaintiffs allege only that K.F. Alder attended a risk discussion meeting in London and agreed with its joint venturers as to the risks they would collectively assume. JA-32 (Cal. Compl. ¶¶ 94-95); JA-84-85 (Conn. Compl. ¶¶ 98-99). There is not a single allegation of any coercive conduct by K.F. Alder.[6] The alleged agreements challenged by the plaintiffs relate to the risks the participants would share. There were no naked agreements to eliminate competition among the participants.

Here, as in *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 20 (1979), the product that is the subject of the alleged agreements cannot be made available absent cooperation

6. The States' suggestion that they have offered this Court so little factual support for their conclusory allegations because "no discovery on the merits has yet been allowed," States Brief at 40, is belied by the record. The filing of the complaints followed two year investigations conducted by the regulatory agencies of several states. A-34, 78. Moreover, the District Court gave the parties a full opportunity to conduct any discovery relevant to the issues raised in the instant motions. A-78. The District Court's pre-trial order stated that "[a]fter motions have been filed, upon specific request by any party having to respond to a motion, the Court may permit specified discovery for that purpose." JA-105 (District Court Pre-Trial Order No. 2, dated September 8, 1988). The plaintiffs failure to avail themselves of this opportunity does not excuse their inability to establish subject matter jurisdiction at this late date.

among the participants. By its nature, treaty reinsurance involves the underwriting of extremely large risks. The plaintiffs admit that the spreading of these large risks in the London reinsurance market necessarily requires collective activity. A-68; JA-11, 17 (Cal. Compl. ¶¶ 4(u), 28, 31); JA-61 (Conn. Compl. ¶ 4(g)). As a result, treaty reinsurance requires negotiations over the terms and conditions on which risks will be accepted and insured among the numerous subscribers. A-68; JA-11, 17 (Cal. Compl. ¶¶ 4(u), 28, 31); JA-61 (Conn. Compl. ¶ 4(g)). Agreements as to the risks the reinsurers will collectively assume are essential to the operation of the London reinsurance market and are permitted by British law. A-73; JA-263 (The Restrictive Trade Practices (Services) Order 1976, S.I. 1976 No. 98, Schedule ¶ 8); JA-291 (Competition Act of 1980, § 2, vol. 47 Trade & Industry (PT 1)).

As both courts below found, there are legitimate business reasons for the British defendants, including K.F. Alder, to join together and agree to the terms on which they would underwrite risks. A-31; A-76-77. In fact, the plaintiffs themselves acknowledge the legitimate business reasons for the purported agreements by alleging that these agreements were designed to "reduce [the reinsurers'] financial exposure to such risks . . . ." JA-89 (Conn. Compl. ¶ 117). Thus, these joint underwriting agreements could not possibly qualify as naked restraints or consensus wrongs under the law of nations. *See* Brief for Petitioner Sturge Reinsurance Syndicate Management Limited in No. 91-1128, dated November 19, 1992 ("K.F. Alder Opening Brief") at 21-22.

The British Government has an "obvious legitimate interest in the stability and reliability of the insurance and reinsurance market in its territory." *See* Brief for the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners, dated November 19, 1992 at 13. "[T]he

requirement of a minimum solvency margin cannot by itself secure the financial stability of any insurer." *Id.* at 11. The insurers themselves have the obligation "not [to] take on unreasonable or unpredictable risks." *Id.* When reinsurers jointly underwrite the same portfolio of risks, they must make prudential decisions jointly. They must be free to determine whether coverage of pollution risks is reasonable and feasible as opposed to uneconomic and potentially financially disabling. Where (as here) co-underwriters do this and no more, they are engaged in justifiable business conduct. It would be extraordinary for an American court to second guess the expert firms' prudential judgment and determine that it was not too risky for the British underwriters to have extended their product and indeed that United States antitrust law required them to do so.

K.F. Alder's argument to this Court is not based on a conflict of substantive law. There is no conflict between American and British law on the legality of straightforward, noncoercive cooperation among joint underwriters. Such conduct is natural, necessary and normal around the world. At worst, under United States law, the agreement would be judged under a rule of reason to allow consideration of its procompetitive, efficiency-enhancing qualities. *See National Collegiate Athletic Assoc. v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 98-104 (1984) (joint selling arrangements must be judged under rule of reason in an industry in which such arrangements are necessary if the product is to be sold at all); *Broadcast Music, Inc.*, 441 U.S. at 16-24 (blanket licensing practices, under which numerous individuals market their copyrighted musical compositions jointly, where it would be uneconomical for them to do so individually, have procompetitive properties and must be judged under a rule of reason); *National Bankcard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592, 605 (11th Cir.) (joint fixed-fee arrangement, necessary to the marketing of a universally accepted credit card, was procompetitive

and thus upheld under rule of reason analysis), *reh'g denied*, 785 F.2d 1037 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986).

Undoubtedly cognizant of the benign nature of collaboration among reinsurers, the plaintiffs try to link these agreements to the claims of coercive boycott and to sweep K.F. Alder into their global dragnet. *See supra* footnote 5. But the plaintiffs cannot accomplish this result by mere words in their briefs.[7] If limits to extraterritorial jurisdiction mean anything, they mean that a would-be regulating nation cannot second guess the normal, natural and necessary business conduct of foreigners with other foreigners on foreign soil.

B. K.F. Alder Is A Wholly Foreign Entity That Acted Solely With Other British Firms In The United Kingdom In A Manner Invited By United Kingdom Law

There is no justification for the expansive reach of United States antitrust law sought by plaintiffs. K.F. Alder's legitimate and

7. In opposing the instant motion and seeking to require a foreign national to defend itself against the machinations of American litigation and the potential substantial liability and restrictions of the Sherman Act, it was incumbent upon the plaintiffs to come forward with something more than bare conclusory allegations. *See Furlong v. Long Island College Hospital*, 710 F.2d 922, 927 (2d Cir. 1983) ("conclusory statements [cannot] substitute for minimally sufficient factual allegations"). *Cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (opponent of summary judgment motion must set forth specific facts showing no genuine issue for trial); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (opponent of summary judgment motion "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial"). As the District Court concluded "the allegations [plaintiffs] made in their complaints and the facts they proffered in opposition to the motions represent their best effort" and thus the plaintiffs have not met their burden. A-78.

necessary business acts outside the United States ought not be subjected to the burdens of the Sherman Act.

K.F. Alder is a British company, wholly owned by British nationals, with its principal place of business in London, England. JA-11, 13 (Cal. Compl. ¶¶ 4(t), 12); JA-61-62, 68-69 (Conn. Compl. ¶¶ 4(h), 25). It is not alleged to have, and does not have, any American parent or affiliates. In addition, there is not a single allegation that K.F. Alder performed any act in the United States in furtherance of any alleged conspiracy. K.F. Alder is not alleged to have had any contact with plaintiffs (or with any other insurance consumer) or to provide comprehensive general liability insurance in the United States. The sole specific conduct allegation against K.F. Alder is that it attended a single meeting in London together with certain of the British defendants at which they allegedly agreed to the terms on which they would jointly underwrite reinsurance coverages. JA-32 (Cal. Compl. ¶¶ 94-95); JA-84-85 (Conn. Compl. ¶¶ 98-99).[8]

8. Contrary to the States' claim, the European Community Court of Justice has thus far declined to extend extraterritorial jurisdiction to conduct—even cartel conduct—by a foreign firm where that conduct is not *implemented* in the Community. Joined Cases 89, 104, 114, 116, 117 and 125 to 129/25, *A. Ahlstrom Osakeyhtio v. Commission ("Wood Pulp")*, 1988 E.C.R. 5193. The States have selectively quoted from this case, claiming that KEA was dismissed because it "'played [no] separate role'" and, thus the States conclude that KEA "added nothing to [that] case." State Brief at 30 n.31. In *Wood Pulp*, the European Community Court accepted jurisdiction over the members of KEA because they "implemented" their agreement within the Community. *Id.* at 5243 ("The decisive factor [in extraterritorial jurisdiction] is therefore the place where [the agreement] is implemented."). KEA was dismissed because it "played [no] separate role *in the implementation*" of the challenged agreements. *Id.* at 5245 (emphasis added).

The wholly foreign character of K.F. Alder and its conduct, combined with the facial legitimacy of its conduct, counsel dismissal.[9]

C. K.F. Alder Is At Most At The Outer Fringes Of Any Alleged Conspiracy

K.F. Alder's alleged conduct is far removed from the heart of the claims of plaintiffs, as consumers of primary insurance, to the manner in which primary insurance in the United States is written. K.F. Alder is at the far end of the continuum. By their own admission, the States challenge a scheme "first set in motion by American primary insurer defendants" to dictate the terms and availability of primary insurance in the United States. States Brief at 4. Indeed, the States admit that the "complaints focus not on [the London reinsurance] markets, but on *the market for insurance risks within the United States*." States Brief at 17 n.17 (emphasis in original).

The core alleged conspiracy is among *American* primary insurers to limit insurance coverage for North American risks. JA-36-37 (Cal. Compl. ¶¶ 111-15). One step removed from this core allegation, certain reinsurers (but not K.F. Alder) allegedly conspired with the primary insurers, JA-37-43 (Cal. Compl. ¶¶ 116-30); JA-90-94 (Conn. Compl. ¶¶ 120-29), and engaged in

9. The respondents private party plaintiffs explicitly base their argument for extraterritorial jurisdiction on the contention that "within the United States, many of the[] foreign defendants also conspired and joined with the American defendants, for the same illicit purpose, in other unlawful conduct." Private Party Plaintiffs Brief at 43. However, the private party plaintiffs studiously ignore the fact that K.F. Alder is not alleged to have conspired with any American defendant or to have committed any act within the United States.

conspiratorial acts *in the United States*. JA-28-30 (Cal. Compl. ¶¶ 79-85); JA-80-82 (Conn. Compl. ¶¶ 82-89). And even more peripheral to the core complaint, certain reinsurers (but not K.F. Alder) allegedly refused to reinsure occurrence and long tail risks. JA-43-44 (Cal. Compl. ¶¶ 131-35); JA-92-94 (Conn. Compl. ¶¶ 125-29). Still further removed from the core conduct, certain reinsurers including K.F. Alder, in evaluating the risks they would collectively share, agreed that they would participate only in reinsurance of underlying primary insurance that contained a pollution exclusion. JA-45-46 (Cal. Compl. ¶¶ 136-40); JA-94-97 (Conn. Compl. ¶ 130-39). As its conduct relates to this action, K.F. Alder participates in *reinsurance*. Plaintiffs, however, are consumers of *primary* insurance, an entirely different product. K.F. Alder is on the outer fringes of these claims. Indeed, K.F. Alder is not merely remote from the core of the action; it is disconnected from it. K.F. Alder is a victim of a dragnet.

If relief were warranted in this case after trial, plaintiffs could get full relief without extraordinary extraterritorial jurisdiction. Jurisdiction over K.F. Alder is not necessary or important to exonerate the United States interest in free competition, because the actors closely related to the alleged wrong are before the District Court.

* * *

In this case the Court has an opportunity to define the limits of the extraterritorial reach of United States law. This Court has not yet addressed the application of United States antitrust law to one who, like K.F. Alder, has no corporate affiliation with any United States company, participates only in the London reinsurance market with respect to the claims at issue, is not alleged to have conspired with any United States company, is not alleged to have implemented any purported conspiracy in the United States, and

merely engaged in collaborative activity where collaboration was necessary if the product was to be available at all. Economics, fairness, and respect for other nations should counsel this Court to declare a limiting principle on extraterritorial jurisdiction and to dismiss the claims against Petitioner K.F. Alder. Such a limiting principle will legitimate expansive jurisdiction where necessary to deal with consensus wrongs.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in its brief on the merits, Petitioner K.F. Alder respectfully requests that as to K.F. Alder the judgment of the Court of Appeals for the Ninth Circuit on the London reinsurance claims be reversed, the judgment of the District Court for the Northern District of California be reinstated and all claims against K.F. Alder be dismissed for lack of subject matter jurisdiction, or alternatively, in the interests of comity.

Dated: New York, New York
January 22, 1993

Respectfully submitted,

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Nos. 91-1111 and 91-1128

In the Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., ET AL.,
AND
MERRETT UNDERWRITING AGENCY MANAGEMENT
LIMITED, ET AL.,
PETITIONERS

v.

STATE OF CALIFORNIA, ET AL., RESPONDENTS

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**REPLY BRIEF FOR THE PETITIONERS
IN NO. 91-1111**

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I. THE FORFEITURE RULING IS ERRONEOUS

The Solicitor General agrees with us that the Ninth Circuit's forfeiture ruling is "wrong." U.S. Br. 12. As he explains, Congress understood the vital role of foreign reinsurance in the United States and the need for agreements between insurers and reinsurers, and did not expect that these agreements would result in forfeiture of McCarran immunity. *Id.* at 10-12.

Perhaps the best evidence that the court of appeals' forfeiture ruling is indefensible is that plaintiffs make no effort to defend it on its own terms. Rather, they argue that the domestic defendants (a) were responsible as "co-conspirators" for the actions of unregulated foreign reinsurers and (b) forfeited immunity for their own acts because they furthered the "non-exempt conspiracy." St. Br. 35-37, 42; Pr. Br. 35-39. These merely verbal variations of the Ninth Circuit's forfeiture theory add nothing to its substance.

Plaintiffs' "non-exempt conspiracy" arguments rest on a mistaken view of state regulatory authority over the conduct at issue. As we explain (pages 2-6, *infra*), the activities of the foreign reinsurer defendants in which the domestic defendants allegedly joined *were* subject to state regulation. But even if the activities of the foreign reinsurers were not regulated, the conduct of the *domestic* insurance defendants would not be any less a part of the regulated business of insurance.

A rule that exposed insurance companies to antitrust attack as "co-conspirators" whenever they reached agreement with foreign reinsurers would unravel McCarran and seriously disrupt established insurance practices. See *City of Columbia* v. *Omni Inc.*, 111 S. Ct. 1344, 1351 (1991) (rejecting a "conspiracy exception" that would "virtually swallow" an antitrust immunity). Plaintiffs' amorphous conspiracy theory also would deny insurance companies immunity for cooperative activities with unregulated consumer organizations and corporate risk managers. NCOIL Am. Br. 15.

As both lower courts found (Pet. App. 25a, 41a-42a), the claim that defendants conspired to restrain trade in the umbrella and excess insurance markets (J.A. 46, 97) alleges no boycott. Because the judgment on that claim rests *solely* on the court of appeals' erroneous forfeiture ruling, it must be reversed.

II. ALL OF THE RELEVANT REINSURER CONDUCT WAS SUBJECT TO STATE REGULATION

Plaintiffs challenge (Pr. Br. 26-34) the holding of both courts below (Pet. App. 20a, 48a-49a) that "American reinsurers" are "subject to regulation by the states and therefore prima facie immune." That challenge comes too late. *Lucas* v. *So. Carolina*, 112 S. Ct. 2886, 2896 n.9 (1992). The issue whether domestic reinsurers are regulated by the states is not included in the grant of certiorari. Nor did plaintiffs raise that issue in a cross-petition, as they were required to do because their argument would modify the judgment below. *T.W.A.* v. *Thurston*, 469 U.S. 111, 119 n.14 (1985). The Ninth Circuit held that foreign reinsurers were unregulated and therefore dismissed all state insurance law claims (J.A. 49-50) against them. Pet. App. 19a-20a. If accepted, plaintiffs' argument that the states do not regulate "American reinsurers" would require dismissal of the state-law claims against them as well. An argument that would produce such a modification in the judgment below requires a cross-petition. *FEA* v. *Algonquin SNG*, 426 U.S. 548, 560 n.11 (1976).

In any event, plaintiffs' assertion (Pr. Br. 29) that the reinsurer defendants "operat[ed] unfettered by state regulation" is plainly wrong. To be sure, reinsurance is regulated *differently* from primary insurance, as the articles cited by plaintiffs explain.[1] The question for McCarran purposes, however, is whether the *activities* of the reinsurers *challenged in plaintiffs' complaints* were "regulated by State Law." Examination of the "uncontested details of the state regulatory systems" (St. Br. 2 n.1), as presented to

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[1] *E.g.*, Havens & Theisen, 54 ANTITRUST L.J. at 1304 (reinsurers are subject to a state "regulatory scheme [that] is an eminently logical one given the nature of reinsurance"); Thompson, 16 FORUM at 1043 ("state regulation of reinsurance plays an important role in the way reinsurers run their business"). These articles address the McCarran immunity only in general terms. *E.g.*, Havens & Theisen at 1309, 1318 (cases indicate that McCarran's "exemption remains available to reinsurers," but "[t]here are not enough [cases] to establish [this proposition] with confidence"). None of these articles addresses the question whether conduct of the kind alleged in *this* case is subject to regulation through the forms-approval process and unfair insurance practices legislation.

both courts below in multi-volume state-by-state appendices, establishes that they clearly were.

It is particularly untenable to suggest that domestic reinsurers' cooperation with primary insurers in forms development—conduct at the very heart of the McCarran exemption—was not regulated by the states. Regulators intensively scrutinized the development and implementation of the proposed CGL forms filed between 1984 and 1986. See Pet. Br. 6-8; J.A. 113-127. State insurance departments reviewed these forms with unprecedented thoroughness, holding public hearings and receiving the views of state attorneys general and others (including reinsurers). J.A. 115-117. Regulators were well aware of reinsurers' participation and their dissatisfaction with existing coverages. *E.g.*, J.A. 118, 133-134, 165, 174, 175, 177-178. They had the power to limit, disapprove, or require modification of any proposed forms determined to be anti-competitive or otherwise against the public interest—and used that power repeatedly. J.A. 119, 121-127, 132-151. Plaintiffs could have brought any claim of anti-competitive behavior to these regulators at any time, and they are free to do so today.

In addition, the district court correctly held (and the Ninth Circuit did not disagree) that all of the conduct attributed to the domestic reinsurers fell within the reach of state unfair insurance practices acts (UIPAs), which prohibit anti-competitive conduct by "any persons in the business of insurance, including reinsurers." Pet. App. 48a-49a. These laws are sufficient to support McCarran immunity. *FTC* v. *National Cas.*, 357 U.S. at 564.

Plaintiff California's UIPA, for example, under which a claim was asserted against all of the reinsurer defendants (J.A. 49-50), prohibits "a broad spectrum of unfair and deceptive practices and anticompetitive activity in the insurance field." *Karlin* v. *Zalta*, 201 Cal. Rptr. 379, 390 (Ct. App. 1984). It specifically bars any "trade practice" that is "an unfair method of competition or an unfair * * * act or practice in the business of insurance." Cal. Ins. Code §§ 790.02, 790.06(a); J.A. 186-187, 228-229. This law was enacted "to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the [McCarran Act]." J.A. 187. Thus, in California "a reinsurer * * * is potentially subject to a broad range of anti-competitive and

unfair practices proscriptions" that constitute state regulation for McCarran purposes. Bank & Trent, ***Regulation of Reinsurance***, in REINSURANCE LAW, LITIGATION AND ARBITRATION IN THE UNITED STATES 77, 82-83 (1991). Other states' UIPAs—which like California's were enacted to invoke McCarran immunity—impose the same requirements. Def. State-by-State App. ¶ (1); St. Reg. App. ¶¶ B, F. More generally, states may license reinsurers, deny credit to primary insurers for business ceded to unapproved reinsurers, set conditions on approval of reinsurers, and require reinsurers to designate agents for service of process. Bank & Trent at 80; Ins. Agents Am. Br. 10.

The alleged conduct of the foreign reinsurers was subject to substantially identical supervision. Whatever the truth of the claim that states do not "regulate the bulk of international insurance transactions" (St. Br. 4 n.7), it is plainly inapplicable to the specific allegations here. The states regulated the foreign reinsurers' participation in forms development through the forms-approval process and had power to supervise their contracts with primary insurers. All foreign reinsurers were also within the scope of state UIPAs. Indeed, many plaintiffs filed UIPA claims against *all* reinsurer defendants. J.A. 49-50. Only New York has denied that its UIPA reaches foreign reinsurers' conduct (N.Y. Supp. Ct. App. Brs.; St. Br. 34); that interpretation is contrary to the statute's plain language, which broadly applies to any entity "engaged in the business of insurance" in the state (N.Y. Ins. Law § 2402(a)), not only to entities licensed as "doing an insurance business" in New York. *Id.*, § 1101. Plaintiffs also admit that regulatory orders can effectively be enforced against foreign reinsurers. St. Br. in 91-1128, at 39-40.

National Casualty leaves no doubt that state UIPAs constitute sufficient regulation under McCarran. 357 U.S. at 564-565. See also, *e.g.*, *Workers' Comp. Ins. Antitrust Litig.*, 867 F.2d at 1559. This Court squarely rejected plaintiffs' claim (St. Br. 38 n.43) that state regulation qualifies for McCarran purposes only when it is "effectively applied" and not "inchoate." *National Cas.*, 357 U.S. at 564. It thus distinguished between McCarran's regulation requirement and the more rigorous rule in *Parker* v. *Brown*. See Pet. Br. 17 n.7. Plaintiffs' *Parker* argument would destroy

McCarran as an independent exemption and was disapproved by Congress. H.R. Rep. No. 873, at 7; S. Rep. No. 1112, at 5.

Likewise, *National Casualty* rejected plaintiffs' specious theory (St. Br. 39 n.45) that because McCarran commands that federal laws not be construed to "invalidate" state regulation, its immunity is triggered only when state regulation conflicts with antitrust law. See also 91 Cong. Rec. 1478 (Sen. Pepper); *Workers' Comp.*, 867 F.2d at 1559. Indeed, amici candidly concede (19 St. Am. Br. 25 n.30) that acceptance of plaintiffs' arguments *would necessitate overruling National Casualty.*

Plaintiffs further argue that "state regulation of activities carried on beyond the borders of the regulating state" does not activate McCarran immunity. St. Br. 34-35; Pr. Br. 32-33. But plaintiffs acknowledge that the effects of the foreign reinsurers' alleged actions "occurred principally or exclusively" in domestic markets and that those actions were intended to have and had a "significant effect" on local commerce. J.A. 254-255; St. Br. in 91-1128, at 20-22, 40. Under current due process principles the states have undoubted jurisdiction in these circumstances. *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957).

Plaintiffs nevertheless contend (Pr. Br. 32-33) that only regulation regarded as constitutional when McCarran was enacted can qualify for immunity, and that in 1945 the states lacked jurisdiction over such practices. This crabbed interpretation contradicts McCarran's goal of supporting "existing and future state [regulatory] systems" (*Prudential Ins.* v. *Benjamin*, 328 U.S. 408, 429 (1946)) and has no basis in McCarran's text or the cases plaintiffs cite. The strict territorial due process restriction plaintiffs read into McCarran broke down long before the Act was passed (*e.g.*, *Doherty* v. *Goodman*, 294 U.S. 623 (1935)); by the time McCarran was enacted it was settled that a "minimum contacts" standard permits the states to regulate acts that have effects on local residents. *International Shoe* v. *Washington*, 326 U.S. 310 (1945); *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643 (1950) (citing pre-McCarran cases).[2]

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[2] Plaintiffs' reliance on *FTC* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960), also is misplaced. That case held that while "a single State's

Plaintiffs' radical theory that reinsurers cannot be regulated by state law not only would inflict serious injury on state regulatory systems but also would defeat McCarran's core purposes. Congress intended to immunize consultations between primary insurers and reinsurers about the terms of coverage. See Pet. Br. 19-20, 32-34; U.S. Br. 12. If plaintiffs' argument were correct, such cooperation would automatically be exposed to antitrust attack. This would result in the "chaos and confusion" that Congress meant to avert when it fashioned the antitrust exemption. 91 Cong. Rec. at 1485 (Sen. McCarran).

III. PLAINTIFFS' McCARRAN BOYCOTT CLAIMS ARE INSUFFICIENT AS A MATTER OF LAW

Plaintiffs' multi-count complaints are replete with detailed allegations of meetings, discussions, and public announcements by defendants that are darkly characterized as coercive "boycotts." Citing these allegations, the court of appeals held that plaintiffs had pleaded "much more" (Pet. App. 21a) than an agreement among defendants on terms of insurance. Challenged to defend the Ninth Circuit's ruling, plaintiffs now beat a hasty retreat from their sprawling theory of boycott and instead articulate an argument that, by being more sharply defined, is all the more clearly insufficient as a matter of law. Plaintiffs' case, it turns out, is really about "much less," not "much more."

Nowhere in their briefs do plaintiffs even mention—let alone justify as charging a "boycott"—the individual claims in the so-called "forms development" counts against the domestic defendants and various foreign reinsurers (J.A. 36-43, 90-92) and the "market conduct" counts against the foreign reinsurer defendants (J.A. 43-46, 47-49, 92-97). Rather, plaintiffs refer indiscriminately to

attempted regulation of its domiciliary's extraterritorial activities" would not suffice for McCarran immunity, regulation by the state in which an act "has its impact" or "operative force" is enough. *Id.* at 297-299, 301-302. *State Bd. of Ins.* v. *Todd Shipyards*, 370 U.S. 451 (1962), simply denied state power to tax insurance premiums without a reasonable nexus to the taxing state. Neither case suggests that McCarran leaves state regulators powerless to reach ongoing commercial conduct that is intended to and does have a substantial impact on local economies.

defendants and counts as if they were all linked to a single overarching conspiracy. Although such a "global conspiracy" was pleaded (J.A. 88-90) in the Connecticut complaint (it was not included in the California complaint at all), it was *dismissed* by the district court on the ground that "the allegations of the complaint would not permit proof of [a single overall conspiracy]" (Pet. App. 69a), and that dismissal was *affirmed* by the Ninth Circuit with leave for plaintiffs to seek to amend. *Id.* at 27a. *Plaintiffs thus have hinged their boycott argument on a count that is not currently in the case* and that will be subject to vigorous challenge in the district court if and when plaintiffs offer a specific amendment. See *Associated General Contractors*, 459 U.S. at 528 n.17 ("in a case of this magnitude, a district court must retain the power to insist upon some specificity of pleading before allowing a potentially massive factual controversy to proceed"); *Llewellyn* v. *Crothers*, 765 F.2d 769, 775 (9th Cir. 1985) (Kennedy, J.) ("'[v]ague and unsupported conspiracy allegations deserve very little respect from the antitrust court'").[3]

Having clarified the nature of plaintiffs' complaints, we do not shrink from meeting the broadest reach of their argument. As demonstrated below, plaintiffs' claims—whether considered individually or together, and with or without an allegation of global conspiracy—are legally inadequate under McCarran. However, the sweeping allegations of plaintiffs' complaints against commonplace meetings and discussions among insurers over acceptable terms of insurance, coupled with the Ninth Circuit's amorphous "much more" ruling on boycott, have understandably caused confusion in the insurance industry. At a minimum, this Court should make clear, as plaintiffs and the Solicitor General now concede (St. Br. 2, 5-6 n.9, 22, 30; U.S. Br. 8), that the normal process conducted under the auspices of ISO and regulated by the states for jointly

[3] Plaintiffs incorrectly assert that they were denied discovery (St. Br. 10-11 n.15, 23 n.25); the order limiting discovery to undisputed facts was confined to discovery submitted before the filing of dispositive motions, and in fact plaintiffs requested—but withdrew as unnecessary—discovery as to disputed facts. See J.A. 105, 110-111. Despite their two-year investigation (Pet. App. 57a-58a, 83a-84a), plaintiffs have never raised any factual issue material to their boycott claim.

proposing, debating, and revising standardized advisory insurance forms—including, as alleged here, solicitation of the views of reinsurers as to whether they would offer reinsurance on the proposed forms—does *not* constitute a boycott.[4]

The gravamen of plaintiffs' boycott theory is that "defendant primary insurers enlisted reinsurers 'to compel capitulation' by competing primary insurers to the defendants' demands" for elimination of "long-tail and pollution insurance" coverages. St. Br. 2, 3. According to plaintiffs, the reinsurers agreed that they would not provide reinsurance for long-tail and pollution coverages included in the proposed ISO advisory forms, thereby causing ISO to modify those coverages, and the foreign reinsurers further agreed not to reinsure primary insurance written on any basis for long-tail and pollution risks. *Id.* at 7-8.[5] Moreover, following state approval of the revised 1986 ISO forms, ISO discontinued statistical support for its superseded 1973 form. *Id.* at 9.

Plaintiffs concede that under McCarran, primary insurers may confer and agree on terms of insurance; that reinsurers may similarly confer and agree; and that primaries and reinsurers may confer and agree on the terms on which they will do business with each other. With all this, we agree. See pages 16-19, *infra*. Thus, the basic difference between us and plaintiffs is reduced to the question whether a McCarran boycott can be established by

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[4] Plaintiffs' concession highlights the particular weakness of their boycott claim with respect to the forms-development counts. Standardization of advisory policy forms is central to the state-regulated business of insurance that Congress intended to protect from federal antitrust review. The reinsurers' determination that they would not reinsure certain coverages in the proposed forms that they believed presented unacceptable risks, for the asserted purpose of altering the forms that would be submitted to state insurance regulators for approval, cannot be deemed a "boycott" without creating a gaping hole in McCarran immunity and impairing the integrity of the state regulatory process. See Pet. Br. 2-3, 19-20, 32-34, 48; American Ins. Ass'n Am. Br. 9-22.

[5] Plaintiffs do not contend that any defendants engaged in an absolute refusal to deal or discriminated by refusing to provide reinsurance to particular primary insurers on the same terms available to others.

allegations that an agreement among defendant insurers and reinsurers relating to general terms of coverage has an effect on other primary insurers. Where, as here, the agreement simply provides for acceptable coverage terms and is not even alleged to exclude or discriminate against any primary insurer, such allegations do not transform a protected agreement into an unprotected boycott.

A. ***Statutory language***. Section 3(b) of McCarran speaks of "boycott, coercion, or intimidation." The natural meaning of those related terms plainly requires conduct that is oppressive or destructive in nature. See, *e.g.*, BLACK'S LAW DICTIONARY (5th ed. 1979) at 234 ("coerce" means "constrained to obedience, or submission in a vigorous or forcible manner"), 737 ("intimidation" means "[u]nlawful coercion; extortion; duress; putting in fear"). Congress so understood this language in adopting McCarran. See 90 Cong. Rec. at A4406 (the boycott exception applies to "oppressive or destructive practices"), 6625 (Sen. Hatch) (the boycott exception applies to "vicious," "obnoxious," and "evil" practices). And in *SEUA*, this Court made clear that the alleged "boycott[,] * * * coercion and intimidation" represented just "such destructive business practices." 322 U.S. at 535, 562. Accordingly, as used together with "coercion" and "intimidation," the word "boycott" in McCarran cannot be stretched to reach the type of conduct alleged here, which (until this case) has been a normal and frequently occurring part of the business of insurance, and which, as the Solicitor General suggests (U.S. Br. 14 n.11; U.S. Pet. Br. 14-16), is not so clearly anti-competitive as to be subject to a per se rule rather than the rule of reason. It is both unprecedented and unwarranted to label as a "boycott" agreements on acceptable terms of insurance "directed primarily at reducing * * * exposure to certain risks and controlling losses, a legitimate business purpose." Pet. App. 81a-82a.

B. ***Legislative history***. McCarran's legislative history establishes with unusual clarity the paradigms of the activities that are exempt from the federal antitrust laws under the basic statutory immunity and those to which the Sherman Act applies under the boycott exception. As Congress understood, agreements among insurers on terms and conditions of insurance, which traditionally have been part of the business of insurance and are undertaken pursuant to state regulation to protect the public interest, fall within the safe

harbor of immunity. However, concerted conduct that is unambiguously pernicious and tantamount to a system of private government controlling the insurance industry, and that therefore is inherently unjustifiable and does not call for the informed superintendence of expert state insurance regulators, remains subject to the Sherman Act. Because the activities at issue in this case are at the heart of the former category and bear no resemblance to the latter, they are immune.

Throughout its consideration of McCarran, Congress recognized that, given the unique nature of insurance, a wide range of agreements was legitimate and served to promote insurer solvency, placement of reinsurance, and accurate data collection and underwriting projections. See Pet. Br. 2-3, 19-20, 32-34 & n.15. Congress understood that these agreements would extend (subject to state regulation) to such matters as "rates" (H.R. Rep. No. 873, at 8), "forms of policies" (*ibid.*), "forms of coverage" (*Committee Print* at 5; 90 Cong. Rec. at 6526 (Rep. Hancock)), and "terms" and "conditions" (*id.* at 6536 (Rep. Howell)). This understanding applied fully to the final version of the bill that emerged from conference; the post-conference debates acknowledged that these agreements were legitimate and in the public interest. For example, Senator O'Mahoney, one of the conferees, stated that a rating bureau agreement to set prices would be protected under the Act and was an example of the kinds of "agreements which can normally be made in the insurance business which are in the public interest, but which might conceivably be a violation of the antitrust law." 91 Cong. Rec. at 1444; see also *id.* at 1481, 1484 (Sen. Ferguson), 1481 (Sen. Pepper), 1485, 1486 (Sen. O'Mahoney).[6]

In enacting the boycott exception, Congress had in mind a completely different type of conduct and never conceived that an agreement on insurance terms could be a boycott. The boycott

[6] Plaintiffs (St. Br. 31 n.36) fault us for relying on legislative history of bills that preceded the final version of McCarran. However, Justices of this Court repeatedly have referred to the same history. See Pet. Br. 19 n.9. Moreover, the propositions for which we cited this history are equally supported by the post-conference debates discussed in text. And in fact plaintiffs and the Solicitor General ultimately agree with us as to those propositions.

section was inserted in the bill at conference. In explaining that provision, Senator O'Mahoney observed that "there are three forms of regulation": state regulation; federal regulation; and the "third, and this has been harmful to the public interest, is regulation by private combinations and groups," which has been "enforced * * * through private rules and regulations under which persons engaged in the insurance industry could be tried and convicted for the violation of private law." 91 Cong. Rec. at 1483. The boycott exception accordingly was intended to prevent "a system of private government" in which "private groups sought, by the imposition of penalties, by writing rules and regulations, and by holding secret trials * * * to enforce not public regulations written by public authority but regulations for the insurance business which they wrote themselves in their wholly private and exclusive associations." *Id.* at 1485 (Sen. O'Mahoney). The boycott exception would "outlaw[ ] completely all steps by which small groups have attempted * * * to say who should and who should not engage in the insurance business." *Ibid.*

The legislative record discusses a number of insurance organizations—including SEUA (see pages 13-14, *infra*)—that had prescribed private rules and imposed severe penalties (including "discrimination" and "blacklist[ing]") in an effort "to exercise complete control over [the] vast [insurance] industry." See, *e.g.*, 91 Cong. Rec. at 1483 (Sen. Radcliffe), 1485-1486 (Sen. O'Mahoney), 1087 (Rep. Celler); 90 Cong. Rec. at 6546 (Rep. Voorhis), 6560 (Rep. Celler). It was this "sort of agreement which ought to be condemned * * * and which, in the language of [the boycott provision] of the conference report * * * would be completely outlawed." 91 Cong. Rec. at 1486 (Sen. O'Mahoney). See also *id.* at 480, 1481 (Sen. Ferguson), 1485-1486 (Sen. O'Mahoney), 1486 (Sen. Barkley); 90 Cong. Rec. at 6625 (Sen. Hatch).[7]

[7] It was in this context that Congress noted, in a passage plaintiffs heavily rely upon (St. Br. 26 n.29, 30), that the boycott provision would prohibit an agreement among insurers to "penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them." 91 Cong. Rec. at 1480 (Sen. O'Mahoney). This concept of "penaliz[ing] * * * disapproved" conduct refers to the kind of "ruthless program" (*Joint Hearing* at 47-48) involved in *SEUA*, not to agreements to do business on acceptable terms.

This history demonstrates the total fallacy in plaintiffs' boycott allegations. The crux of their theory is that defendant primary insurers and defendant reinsurers agreed on acceptable terms of insurance coverage. Congress understood, however, that such agreements, while impermissible in other industries, were appropriate in the business of insurance and hence exempted from antitrust attack. Where the challenged conduct is no more broadly restrictive of competition than an agreement on acceptable terms of insurance—and such agreements are all that are alleged here—it comes within the safe harbor of McCarran immunity. See Pet. Br. 29-30, 31-32, 34-35.

C. ***Conditional refusals to deal, Barry, and SEUA.*** Plaintiffs also argue that a conditional refusal to deal is a McCarran boycott and that neither an absolute refusal to deal nor discrimination against boycott targets is required. But absolute refusals to deal and discrimination are the traditional hallmarks of a boycott, as shown by the boycott opinions of this Court that preceded passage of McCarran (*Lumber Dealers*, 234 U.S. at 608-609, 611; *FOGA*, 312 U.S. at 461) as well as more recent opinions on which plaintiffs rely (*Klor's*, 359 U.S. at 209, 213; *Northwest Stationers*, 472 U.S. at 294-296 & n.6). See Pet. Br. 32 & n.14. In the particular context of McCarran, which sought to immunize agreements among insurers on terms of insurance, these factors take on special significance in identifying those agreements that are more broadly restrictive of competition than an agreement on terms or conditions. If insurers collectively refuse to deal with others on any terms or discriminate between favored and disfavored entities in the provision of insurance, their agreement is fundamentally different from—and significantly more anticompetitive than—an agreement over the terms and conditions on which they will engage in the business of insurance. Conversely, where, as in the present case, insurers jointly agree to provide insurance on specified terms but not on others (which is all plaintiffs mean by a conditional refusal to deal) and make insurance available on those terms to *all* customers, that is nothing but an agreement on terms.[8]

[8] Contrary to plaintiffs' assertion (St. Br. 25, 27), the legislative history discloses Congress's concern over discriminatory conduct used to "boycott" or exclude targeted companies. See, *e.g.*, 91 Cong. Rec. at 1483 (Sen. Radcliffe) (the boycott provision prevents "boycotting or unjust discrimination"); 90 Cong. Rec. at 6560 (Rep. Celler).

In arguing that a conditional refusal to deal is a McCarran boycott, plaintiffs all but ignore this Court's carefully balanced opinion in *Barry*. That case involved "a 'traditional boycott,' defined as a concerted refusal to deal on any terms, as opposed to a refusal to deal except on specified terms." 438 U.S. at 540. Time and again, the Court emphasized that the defendants, by "refus[ing] to deal on any terms," had gone "well beyond a private agreement to fix rates and terms of coverage." *Id.* at 544, 553. Notwithstanding plaintiffs' argument that these repeated references were merely part of the Court's statement of facts but not part of its legal holding, *Barry* plainly recognized (as the dissent urged) that an agreement over insurance terms could *not* be deemed a boycott. See Pet. Br. 28-31.

Plaintiffs also grossly distort *SEUA* in asserting that it is "indistinguishable" from the present case. St. Br. 21. Contrary to plaintiffs' contention (*id.* at 21-22 n.21), *SEUA* involved an absolute refusal to deal. See Pet. Br. 35.[9] But even if *SEUA* could be characterized as a conditional-refusal case, it provides no support for plaintiffs' boycott theory here.

In *SEUA*, reinsurance was "cut off" (322 U.S. at 535) to all non-SEUA members. Membership in SEUA required adherence to a complex array of privately-fashioned business standards, not simply agreement on specified terms of primary insurance for which reinsurance was sought. Thus, reinsurance was denied *altogether* to non-members, which was done for reasons *entirely unrelated to the terms* on which the primary insurance was written.

[9] The legislative history reflects Congress's understanding that SEUA and other regional associations determined "who should and who should not engage in the insurance business." 91 Cong. Rec. at 1485 (Sen. O'Mahoney); see also 90 Cong. Rec. at 6560 (Rep. Celler). Plaintiffs' argument that SEUA sought to bring all insurers within the Association, rather than to exclude non-members from the market, also collapses the price-fixing conspiracy in count 1 of the indictment into the monopolization conspiracy in count 2.

Indeed, "members are required to withhold reinsurance from nonmember companies *no matter how well the risk may be secured*." S. Rep. No. 1112 (pt. 2), at 5 (minority views of Sen. O'Mahoney) (emphasis added); see also *Joint Hearing* at 48-49, 334-335. Here, in marked contrast, it is alleged not that defendant reinsurers completely refused to do business with any primary insurer, but rather that they declined to provide reinsurance for unacceptable primary coverages—whether offered by alleged co-conspirators or alleged boycott targets.

In addition, the denial of reinsurance in *SEUA* was simply one part of a comprehensive effort "to compel persons who needed insurance to buy only from S.E.U.A. members." 322 U.S. at 535. Among other things, SEUA "punished" agents by withdrawing all of its members' business from them if they "defiantly represented" non-SEUA members; it "boycott[ed]" and "withdr[ew]" all of its members' patronage from companies that purchased insurance from non-SEUA insurers; it "disparaged" the non-SEUA companies; and, as Congress stressed in enacting McCarran, it "effectively policed" the conspiracy through a network of bureaus and boards. *Id.* at 535-536. The denial of reinsurance in *SEUA* cannot be isolated from the rest of this patently coercive scheme.

D. ***Sherman Act precedents***. Unable to allege a boycott under McCarran's language, history, and case law, plaintiffs contend (St. Br. 12, 18 & n.18) that Sherman Act precedents—indeed, the broadest and most recent constructions of "boycott" under the Sherman Act—should uncritically be imported into McCarran. That theory rests on a distortion of *Barry* and would eviscerate McCarran immunity.

In *Barry*, the Court noted that "in the absence of indications to the contrary," Congress "may be assumed [to have] intended this [McCarran boycott] language to be read in light of" the "tradition of meaning" of boycott "as elaborated in" Sherman Act decisions. 438 U.S. at 541. At the same time, however, the Court acknowledged that Sherman Act "decisions reflect a marked lack of uniformity in defining the term" and indeed that "'boycotts are not a unitary phenomenon.'" *Id.* at 543. And the Court also recognized that it had to consider the particular "history" of the McCarran Act and the "mischief" the statute was designed to

remedy. *Id.* at 545-546. This careful analysis refutes plaintiffs' simplistic view that Sherman Act cases control the meaning of "boycott" for McCarran purposes.

Nor could plaintiffs' position be accepted without doing irreparable violence to McCarran. In enacting McCarran, Congress recognized that Sherman Act definitions are "difficult and vague" and have been "variously interpreted and variously misunderstood." 91 Cong. Rec. at 1480, 1487 (Sen. O'Mahoney). McCarran was designed to afford greater certainty to the insurance industry in order "to bring clarity out of a situation of confusion" and thereby avoid the "fear [that insurers] would be in violation of the antitrust law when undertaking to pursue a course which seemed to be in the public interest." *Ibid.* Plaintiffs would relegate the insurance industry to the vagaries and uncertainties that McCarran was intended to eliminate.

In addition, plaintiffs' boycott theory is analytically self-defeating. Virtually all Sherman Act violations can be framed as boycotts, *e.g.*, a price-fixing agreement can be described as a concerted refusal to deal at any other price. This point was noted by the dissenting Justices in *Barry* (438 U.S. at 559 n.6) and has been recognized both by lower-court judges and by commentators. See Pet. Br. 28-29, 44; Areeda & Hovenkamp at 123 (Supp. 1992). If Sherman Act precedents were incorporated wholesale in McCarran, a host of agreements among insurers would be removed from McCarran immunity, directly contrary to the understanding of this Court and Congress that such agreements are exempted. See *Barry*, 438 U.S. at 555; Pet. Br. 34. This absurd result is illustrated by the *Superior Court Trial Lawyers* case cited by plaintiffs; the concerted agreement in that case to refuse to provide services except at a specified price, which the Court characterized as a price-fixing boycott under the Sherman Act (493 U.S. at 422-423, 430-431, 436 n.19), would plainly be protected by McCarran if insurers agreed to offer insurance only at a collectively acceptable rate. In light of the line Congress deliberately drew in McCarran between immune agreements and non-immune boycotts, it is especially clear here that "the category of restraints classed as group boycotts is not to be expanded indiscriminately." *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 458 (1986). See also *Barry*, 438 U.S. at 564 (Stewart & Rehnquist, JJ., dissenting)

(broad construction of boycott provision would defeat the "compromise" Congress reached).

The other Sherman Act cases upon which plaintiffs rely reinforce this conclusion. For example, in contrast to the private product-approval procedure in *Radiant Burners*, the question whether insurers have acted anti-competitively in setting standardized insurance terms is entrusted by McCarran to state regulators and would not be open to a federal antitrust court to resolve. Moreover, unlike the gas suppliers in *Radiant Burners*, who had no legitimate reason for refusing to deal with the disfavored manufacturer's customers and thus were engaged in a naked effort to coerce them to stop dealing with that company (364 U.S. at 659), reinsurers assume part of the risk underwritten by primary insurers and therefore have a legitimate interest in the terms of the policy they are asked to reinsure. See Pet. Br. 1-2.[10] Similarly, in *General Motors*, (a) GM did not simply set the terms on which it would do business with its dealers, but rather refused to do business with targeted dealers because of the way in which they did business with their customers (384 U.S. at 140, 144); (b) the concerted scheme sought to "remov[e] from the market * * * a class of traders" and "put [them] out of business entirely" (*id.* at 148); and (c) as in *SEUA*, there was an elaborate system "to police" the boycott agreements through "multilateral surveillance and enforcement" (*id.* at 144). In none of these respects is the present case remotely comparable to *General Motors*.

E. ***Enforcement activity***. Apparently recognizing the shortcomings in their preceding arguments, plaintiffs fall back on the claim (St. Br. 12, 20 & n.20) that defendants engaged in "enforcement conduct" that transformed their otherwise protected agreements into a boycott. This claim is nothing but semantics.

1. Plaintiffs concede, as they must, the "incontestable" principle (Pet. App. 21a) that agreements among primary insurers on terms of insurance are protected by McCarran. Thus, they acknowledge that agreements on and use of standardized forms, as

[10] Likewise, in *Barry*, the other three insurance companies had no legitimate reason for allegedly refusing to deal with St. Paul's customers.

well as other agreements on terms and conditions, are entitled to immunity. St. Br. 6 n.9, 13, 14, 20 & n.20, 23.

So, too, plaintiffs recognize that reinsurers can enter into similar agreements among themselves over the terms of insurance they will underwrite. St. Br. 23, 24. Reinsurers are, after all, insurers engaged in the business of insurance, and Congress recognized that they may "sit down together and make rules and regulations, forms, and rates." *Joint Hearing* at 265, 269.

Plaintiffs also admit that primary insurers and reinsurers must be free to confer and agree on the terms of primary policies that reinsurers are asked to reinsure and on the terms of reinsurance for those policies. St. Br. 29. The Solicitor General reaffirms this proposition. U.S. Br. 12. As Congress recognized, primary insurers and reinsurers have inseparable interests because reinsurers assume part of the risk specified in the primary policy. See Pet. Br. 1-2, 19-20, 33-34, 40.

Once it is accepted that the foregoing agreements are immune under McCarran, it follows that the inherent effects of such agreements cannot convert protected agreements into unprotected boycotts. Agreements covered by McCarran can be expected to have consequences that, in other industries, would be considered anti-competitive (and in some instances per se unlawful). See Pet. App. 56a-57a. But Congress understood that such agreements serve the public interest in the insurance business.

This principle is well settled in the federal courts. See Pet. Br. 41-42. The Department of Justice also concurs in it. As the Solicitor General previously explained to the Court in this case, a protected "agreement does not become a non-immune boycott merely because it has some effect on other insurers." U.S. Pet. Br. 13. Indeed, in its amicus brief in the Ninth Circuit (at 20 n.18), the Department acknowledged the correctness of this principle even where the agreement had the effect of totally eliminating a form of insurance coverage: "As the district court in this case observed ([Pet. App. 52a-55a]), any agreement to set the terms on which insurance will be offered to purchasers, if adhered to by all insurers, will result in an absence of insurers willing to deal on other terms. If such a concerted refusal to deal constituted a boycott within the meaning of Section 3(b) [of

McCarran], the antitrust exemption for state-regulated agreements among insurers as to the terms of policies would be meaningless."

2. In light of these settled principles, plaintiffs' claim of coercive enforcement conduct simply evaporates. Plaintiffs allege two types of enforcement activities: (a) agreements relating to the terms on which defendant reinsurers would provide reinsurance to non-defendant primary insurers, and (b) discontinuance of statistical support for ISO's superseded 1973 form. As a matter of law, neither claim can withstand scrutiny.

With respect to the alleged denial of reinsurance, plaintiffs concede that reinsurers are free to agree among themselves on acceptable terms for reinsurance generally, and that primary insurers and reinsurers may agree over terms of reinsurance for those primaries who are parties to the agreement. In plaintiffs' view, however, a boycott arises if the discussion between primary insurers and reinsurers provides that the same terms will be offered to other primary insurers. St. Br. 13, 29-30. Plaintiffs' naive insistence (*id.* at 24) that reinsurers' agreements on coverage terms must exist "in benign isolation" from the stated views of primary insurers (which plaintiffs rhetorically characterize as "cartel demands") is unsupported by any legal authority and has no relationship to the considerations Congress deemed relevant in distinguishing boycotts from protected agreements.

To begin with, plaintiffs' argument ignores the public interest in the uniformity of insurance that Congress and state regulators have long recognized promotes the financial soundness of insurers. See page 10, *supra*. Both primary insurers and reinsurers are affected by, and legitimately concerned about, the terms on which the business of insurance is generally conducted. See 91 Cong. Rec. at 1481 (Sen. Ferguson); H.R. Rep. No. 873, at 9.

Beyond this, the complaints nowhere assert that the alleged agreements among defendant primary insurers and reinsurers reflected anything but the business judgment and economic self-interest of each company as to acceptable terms of insurance. In particular, the complaints do not suggest that defendant primary insurers sought to (or even could) "boycott" or "coerce" defendant reinsurers in any way to compel them to accede to dictated terms. Plaintiffs' contention that reinsurers decided on acceptable primary

coverages as part of their discussions and agreements with defendant primary insurers is legally beside the point; the source of the idea—whether advocated by defendant primaries, devised by the reinsurers themselves, or derived from some other source—is simply immaterial. As a matter of law, the claim that the reinsurers agreed, of their own accord, not to reinsure certain unacceptable coverages does not establish a McCarran boycott. See pages 9-12, *supra*.

Plaintiffs' boycott theory is, moreover, completely unworkable, as the facts of this case well illustrate. Primary insurers typically deal with many reinsurers on particular risks and treaties, and reinsurers similarly deal with many primary insurers. Accordingly, every time a primary insurer discussed the terms of its reinsurance agreement with any of its reinsurers, it would "expose[ ] itself to the highly plausible claim" (*Business Elec.* v. *Sharp Elec.*, 485 U.S. 717, 728 (1988))—which could not be resolved on pretrial motion—that it had "suggested" or "requested" or "agreed to" similar terms regarding other primaries. Given these uncertainties, which Congress meant to eliminate (see page 15, *supra*), most insurers and their advisory organizations "would be likely to forgo legitimate and competitively useful conduct rather than risk treble damages." 485 U.S. at 728.

Plaintiffs' further claim—that ISO discontinued its statistical support for the 1973 form once the states had approved the 1986 forms—is even less substantial, and little need be added to our opening brief (at 40-41).[11] As Congress understood, a principal justification for standardized insurance forms is to provide a sufficient universe of comparable experience to generate reliable loss data and actuarial projections. See Pet. Br. 33 & n.15; American Ins. Ass'n Am. Br. 22-24. It would be incompatible with that congressional design and with settled practice in the insurance industry to require insurers and their advisory organization, upon pain of losing McCarran immunity, to continue to bear the expense of compiling statistical support for a superseded form.

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[11] Apparently recognizing that plaintiffs' argument is untenable, the Solicitor General places no reliance on this ground.

F. ***State insurance regulation.*** Plaintiffs assert (St. Br. 29) that their boycott theory is compatible with Congress's policy of entrusting regulation of the insurance industry to expert state insurance regulators rather than to lay jurors and judges in federal antitrust proceedings. Nothing could be further from the truth.

It is undisputed that state insurance regulators intensively reviewed the ISO standardized advisory forms at issue here. It is also undisputed that the changes in long-tail insurance terms, which plaintiffs challenge here, were determined by state regulators to be in the public interest. Pet. Br. 6-8. To allow antitrust courts to intrude in this area, on the ground that there was an alleged "boycott" of certain primary-insurance terms, runs headlong into the system of state regulation that Congress preserved in McCarran. The radical relief plaintiffs seek—which would overturn considered judgments of state regulators on insurance terms—and their avowed "'nuclear attack on the insurance industry'" confirm as much. See Pet. Br. 9-10 n.6, 48.

As noted above (pages 3-6, *supra*), state insurance regulators possess ample powers to rectify any anti-competitive harms plaintiffs allege. The issue here is not whether McCarran leaves such harms uncorrected; it is which governmental body is empowered to regulate the insurance industry and address those concerns: state insurance departments or federal antitrust courts? The McCarran boycott provision allocates to antitrust enforcement a discrete category of clearly destructive and unjustifiable conduct whose validity does not depend upon detailed knowledge and expert judgments about the insurance industry; the broad remainder of the business of insurance McCarran commits to specialized state insurance regulators. A contrary conclusion would lead to the very "chaos and confusion" in the insurance industry that Congress intended McCarran to avoid. See page 6, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Nos. 91-1111, 91-1128

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

Hartford Fire Insurance Co., et al.; Merrett Underwriting Agency Management Ltd., et al.,

Petitioners,

v.

State of California, et al.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE GOVERNMENT OF CANADA AS AMICUS CURIAE IN SUPPORT OF CERTAIN PETITIONERS*

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*The identity of these Petitioners is provided on the inside of the cover.

This amicus brief is submitted in support of Petitioners Merrett Underwriting Agency Management Limited, Three Quays Underwriting Management Limited, Janson Green Management Limited, Murray Lawrence & Partners, D.P. Mann Underwriting Agency Limited, Robin A.G. Jackson, Peter N. Miller, Edwards & Payne (Underwriting Agencies) Limited, and Sturge Reinsurance Syndicate Management Limited.

QUESTION PRESENTED

Did the Court of Appeals properly assess the extraterritorial reach of the Sherman Act consistent with precedents and international law when it held that a U.S. district court should apply U.S. law to reach and punish the conduct of foreign participants in a foreign reinsurance market acting legally pursuant to authority of the local sovereign but contrary to U.S. law?

PARTIES TO THE PROCEEDING

This case involves complaints by nineteen states and numerous private plaintiffs that were consolidated for pretrial purposes by the judicial Panel on Multi-District Litigation in MDL Docket No. 767.

Plaintiffs in the consolidated proceeding, who were also appellants in the Court of Appeals for the Ninth Circuit, were:

States: The States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, Ohio, Pennsylvania, Washington, West Virginia, and Wisconsin.

State or Local Government Entities, Listed by State:

Alabama: City of Mobile; City of Birmingham.

California: City of Lafayette; City and County of San Francisco; County of San Benito.

Louisiana: City of Baton Rouge; City of New Orleans; City of Slidell; City of Nachitoches; City of Eunice.

Massachusetts: Town of Hanover; Town of Milford.

Montana: County of Teton.

New York: Roosevelt Island Operating Authority, Inc., Village of Croton; Village of Lake Success.

Ohio: Township of Jackson; County of Hardin.

Pennsylvania: County of Schuylkill; City of Altoona; City of York; Borough of Chambersburg.

Washington: County of Crowlitz.

West Virginia: City of Clay; County of Hancock; County of Mineral; County of Wirt.

Private Plaintiffs: Big D Building Supply Corp.; Anastasios Markos, T/A Municipal Exxon; Bay Harbor Park Homeowners Ass'n, Inc.; Environmental Aviation Sciences, Inc.; Carlisle Day Care Center, Inc.; Bensalem Township Authority; Keyboard Communications, Inc.; Glabman Paramount Furniture Mfg. Co., Inc.; Les-Ray Bobcat, Inc.; Jerry Grant Chemical Associates, Inc.; Durawood, Inc.; Carmella M. "Boots" Liberto Trading as R.J. Liberto, Inc.; Henry L. Rosenfeld; Acme Corrugated Box Co., Inc.; P&J Casting Corp.; Ace Check Cashing, Inc.

Defendants in the consolidated proceeding, who were also appellees in the Ninth Circuit, were, beside Petitioners, the following:

Allstate Insurance Company; Aetna Casualty & Surety Company; CIGNA Corporation; General Reinsurance Corporation; Hartford Fire Insurance Company; Insurance Company of North America; Insurance Services Office, Inc.; Reinsurance Association of America; Thomas A. Greene & Company, Inc.; Ballantyne, McKean & Sullivan Limited; C.J.W. (Underwriting Agencies) Limited (sued herein as C.J. Warrilow-Hine & Butcher, Ltd.); Lambert Brothers (Underwriting Agencies) Limited (sued herein as J. Brian Hose & Others, Ltd.); R.K. Carvill & Co., Ltd; Continental Reinsurance Corporation (U.K.) Limited; Unionamerica Insurance Company, Ltd.; CNA Re (U.K.), Ltd.; Kemper Reinsurance London, Ltd.; Constitution Reinsurance Corporation; Mercantile & General Reinsurance Company of America; Prudential Reinsurance Company; North America Reinsurance Company; Winterthur Swiss Insurance Company; Excess Insurance Company, Ltd.; Excess Insurance Group, Ltd.; Terra Nova Insurance Company Limited.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

Hartford Fire Insurance Co., et al.; Merrett Underwriting Agency Management Ltd., et al.,

Petitioners,

v.

State of California, et al.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE GOVERNMENT OF CANADA AS AMICUS CURIAE IN SUPPORT OF CERTAIN PETITIONERS

THE INTEREST OF THE GOVERNMENT OF CANADA

The Government of Canada is submitting this brief* in support of certain named petitioners in *Merrett Underwriting Limited et al. v. State of California et al.* because the law as found in the decision below threatens important and legitimate Canadian legal, commercial and economic interests. In particular, Canada is concerned with the exercise of U.S. extraterritorial jurisdiction where it directly conflicts with the exercise of Canada's territorial jurisdiction.

*Pursuant to Rule 37 of this Court, the parties have supplied written consents to the filing of this brief. The consents are filed with the Clerk of the Supreme Court.

Canada relies on the amicus curiae brief of the Government of the United Kingdom to address other Canadian difficulties with the balancing procedure undertaken by the Ninth Circuit. In particular, Canada is concerned that the holding relating to the significance of certain parties being British subsidiaries of U.S. corporations is contrary to U.S. and international law, which provides that a corporation is a national of the country of its organization.

Although the question presented refers to the proper assessment of the extraterritorial reach of the Sherman Act, consistent with U.S. precedents and with relevant principles of international law, Canada's concern does not arise solely in the field of antitrust. Relatively recent decisions by lower U.S. courts, not reviewed by this Court, have adversely affected Canadian interests in several fields by imposing U.S. law on Canadian citizens for conduct within Canada despite the fact that Canadian authorities had either approved or directed contrary conduct, or had exercised what the Government of Canada deemed to be exclusive Canadian regulatory jurisdiction. The decision of the Court of Appeals for the Ninth Circuit in *Merrett Underwriting Agency Management Limited et al. v. State of California et al.* could lead to further adverse effects in other areas of economic activity.

Canada's concern does not lie with the tradition in U.S. antitrust enforcement whereby U.S. jurisdiction reaches some persons and conduct that are extraterritorial to the United States. Where Canadian law and policy applied in Canada are compatible with U.S. extraterritorial enforcement, no conflict need arise. Both Canada and the United States are committed to a policy of generally promoting competition and consumer welfare.

In view of the extensive economic links between our two countries, the Government of Canada has an interest in the application of the laws of the United States in a manner consistent with relevant principles of international law. Canada, like the United States, has a long-standing interest in the development and application of international law. The Government of Canada may be able to assist this Court, as it reviews the

decisions below, in its consideration of the relevance of customary international law to what appears to Canada, respectfully, as a clear embodiment of these principles in U.S. law.

STATEMENT OF FACTS

The Government of Canada is submitting this amicus brief with respect to only one of the two cases the Court has decided to hear, *Merrett Underwriting Agency Management Limited et al. v. State of California et al.* ("*Merrett*"). As more fully explained in the Statement of Facts by the Government of the United Kingdom in its brief amicus curiae, Petitioners in *Merrett* ("Petitioners") are participants in reinsurance and retrocessional reinsurance markets in England. Petitioners are here seeking to overturn only three of about a dozen claims brought against some or all of them for alleged anticompetitive conduct undertaken virtually exclusively in the United Kingdom. No view is expressed on the law or merits of these remaining claims. Unlike the other claims asserted, which involve both U.S. and English defendants, these claims involve *only* English defendants, the Petitioners..

Under these three claims, Petitioners are alleged to have agreed to restrict the scope of reinsurance and retrocessional reinsurance written in England, primarily in the Lloyds market, and to have further agreed to refuse to offer such reinsurance for policies insuring certain identified unacceptably high risks in the United States.[1] Respondents allege that these agreements, whatever their business justification and whatever the delegation of authority under English law to these Petitioners to pursue these commercial goals, are violations of Section 1 of the Sherman Act. For purposes of this Court's review of a summary judgment motion, Respondents' claims must be deemed to be

1. For the purposes of this appeal, the Government of Canada takes as given Judge Schwarzer's conclusion that the London reinsurance markets have a direct and substantial interest in maintaining their financial viability, which is at risk, as a part of the framework of English reinsurance market regulation by collectively limiting the overseas risks which their members assume pursuant to authority delegated by the Parliament of England. *In Re Insurance Antitrust Litigation*, 723 F. Supp. 464, 490 (N.D. Cal. 1989).

true. The Government of Canada takes no position as to whether these claims are factually correct or whether other relevant facts might be adduced if this litigation proceeded.

The district court declined to exercise jurisdiction over these three claims against Petitioners based on considerations of international comity. The district court recognized that Petitioners are foreign participants in a foreign market governed by the laws and traditions of a foreign sovereign, and concluded that:

> enforcement of the antitrust laws against activities in the London reinsurance market would lead to significant conflict with English law and policy. This conflict, unless outweighed by other factors in the comity analysis, is itself sufficient reason to decline the exercise of jurisdiction.

Id. at 489. After considering the other factors in a comity analysis, the district court concluded that this conflict precluded the exercise of U.S. antitrust jurisdiction.

When these claims were appealed to the Court of Appeals for the Ninth Circuit, the British Government formally notified the Ninth Circuit of this direct conflict in an amicus brief. In its opinion, the Ninth Circuit recognized that:

> [t]he district court found that application of the antitrust laws to the London reinsurance market "would lead to significant conflict with English law and policy. " The British [Government's *amicus curiae*] brief reiterates that conclusion; we do not doubt its accuracy.

In Re Insurance Antitrust Litigation, 938 F.2d 919, 933 (9th Cir. 1991) (citation omitted). Nonetheless, it reversed the district court's decision. In essence, the Ninth Circuit held that where a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce is shown, not even a direct conflict with the law of a foreign sovereign operating in its own territory can overcome the presumption of U.S. antitrust jurisdiction. *Id.*

SUMMARY OF ARGUMENT

Established United States law follows and applies international law and should lead to reversal of the decision below. No

comity balancing analysis is required. Absent a clearly expressed intent to the contrary, U.S. law follows customary international law in that a state should not apply its economic law to regulate conduct by persons located in a foreign territory where doing so directly conflicts with and undermines the law of the foreign territorial sovereign. This principle is established in international law, is the law of the United States, and has been consistently applied by this Court in several cases involving statutes with jurisdictional clauses analogous to that of the Sherman Act. The Sherman Act, as amended, and 100 years of Supreme Court decisions interpreting it express no intent to depart from this principle. Repudiating it here would be an unwarranted departure from an unbroken tradition of jurisprudence in the Supreme Court of the United States and in other major states. Following this tradition preserves the extraterritorial application of U.S. antitrust law, or the effects doctrine generally, except where to do so is to undercut the ability of another sovereign state to regulate conduct in its own territory.

ARGUMENT

I. CUSTOMARY INTERNATIONAL LAW, WHICH HAS BEEN ADOPTED AS U.S. LAW, PRECLUDES ONE STATE'S EXERCISE OF ECONOMIC REGULATORY JURISDICTION OVER ACTS OCCURRING IN THE TERRITORY OF ANOTHER STATE WHERE SUCH EXERCISE WOULD CAUSE A SUBSTANTIAL CONFLICT.

A. International Law is a Part of U.S. Domestic Law.

International law is the law of the United States. *The Paquete Habana*, 175 U.S. 677, 700-02 (1900).[2]

2. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *See generally*, Henkin, "International Law as Law in the United States," 82 Mich. L. Rev. 1555, 1561 – 67 (1984). Customary international law is also part of Canadian law. *Ref. Re Exemption of U.S. Forces from Canadian Criminal Courts*, [1943] S.C.R. 483 (S.C.C.) at 516, per Taschereau J. Other sovereigns similarly incorporate international law into domestic law. *Triquet v. Bath* [1764] 3 Burr 1478; 97 E.R. 936 (K.B.) at 938 *per* Lord Mansfield C.J.; *Trendex Trading Corporation v. Central Bank of Nigeria* [1977] QB 529, 554,

B. As a Matter of Customary International Law, States do not Apply Their Economic Regulatory Laws to Acts Committed by Foreign Persons Within the Territory of a Foreign Sovereign Where Such Application Would Conflict With the Laws of the Foreign Sovereign.

Customary international law[3] confers a general principle of territorial preference in cases of conflicting concurrent jurisdiction between one sovereign applying its law within its territory and another sovereign applying its law extraterritorially to command conduct within the other state's borders ("The Territorial Preference").[4]

The United States recognizes both sovereign equality and, correspondingly, The Territorial Preference. For example, in

NOTES *(Continued)*

per Lord Denning MR (C.A.); Basic Law (*Grundgesetz*) of Germany, Article 25; Article 10 of the Italian Constitution of 27 December 1947. *See generally*, F. Morgenstern, "Judicial Practice and the Supremacy of International Law," [1950] 27 BYBIL 42, 61 (discussing supremacy of international law in France, Switzerland, Greece, the Netherlands, Belgium, Denmark and Austria.)

3. International law is derived generally from the following sources:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Article 38(1) of the Statute of the International Court of Justice. Customary international law is evidenced by state statutes and practice, official statements of policy, and the works of eminent jurists and commentators. *The Paquette Habana*, 175 U.S. 677, 700–02 (1900). State practice attains the level of customary international law where it is followed out of a sense of legal obligation (*opinion juris sive necessitatis*). *Asylum Case (Columbia v. Peru)*, [1950] I.C.J. Rep. 266, 277.

4. *See, e.g.*, I. Brownlie, *Principles of Public International Law* 287 (4th ed. 1990) ("The sovereignty and equality of states represents the basic constitutional doctrine of the law of nations . . . . The principal corollaries of the sovereignty and equality of states are: (1) a jurisdiction, *prima facie* exclusive, over a territory . . . ; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states . . .").

The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812), this Court recognized the "perfect equality and absolute independence of sovereigns." Similarly, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964), this Court noted that "the concept of territorial sovereignty is so deep seated, [that] any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders."[5]

Following customary international law, Canadian courts do not generally apply Canadian or provincial law where application would displace or undermine the laws or established policies of another state or province effective within the latter's territory. *See, e.g., Frischke et al. v. Royal Bank of Canada et al.* [1977], 80 D.L.R. (3d) 393 at 404 (Ontario C.A.) (courts should not take such action as would cause violation of the laws, or circumvention of the procedures, of a friendly nation). Judicial decisions and official statements in the United Kingdom, Australia, Sweden, Switzerland, Germany, France, and the Netherlands, constituting state practice and accepted as a

5. When the United States has failed in the past to comply with The Territorial Preference, foreign states have protested the U.S. action. For example, in response to the U.S. extraterritorial application of Siberian pipeline trade controls, the foreign ministers of the twelve European Communities Member States responded, "This action, taken without consultation with the Community, implies extraterritorial extension of US jurisdiction, which in the circumstances is contrary to international law." *The Extraterritorial Application of National Laws* 19 (Lange & Born, eds. 1987), *citing* Statement of the Foreign Ministers of the European Communities, 23 June 1982. *See also* Diplomatic Note from the Canadian Embassy to the U.S. Department of State dated July 7, 1982 regarding the Siberian pipeline trade controls (noting that the U.S. assertion of jurisdiction in that case was "incompatible with the principles of self-restraint and non-interference that underlie the international order."); Comments of the European Community on the Amendments of 23 June 1992 to United States Export Administration Regulations, *reprinted in* A.V. Lowe, *Extraterritorial Jurisdiction* 200, 201 (1983). ("The United States measures as they apply in the present case are unacceptable under international law because of their extraterritorial aspects."). These concerns are not with U.S. extraterritoriality generally. The EC applies its competition law to reach foreign conduct by foreign parents of EC subsidiaries. *See In re Wood Pulp Cartel: Ahlström Osakeyhtio v. EC Commission* [1988] 4 C.M.L.R. 901 (EC Court of Justice).

matter of obligation, reveal that these states also recognize The Territorial Preference.[6]

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6. The following are supporting precedent in these jurisdictions:

United Kingdom: *A.M. Luther v. James Sagor & Co.*, [1921] 3 K.B. 532 at 548 (C.A.) ("It is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country"); *In re Westinghouse Uranium Contract*, [1978] A.C. 547 (Judicial Committee of the Privy Council) (letters rogatory by U.S. court not given effect to extent they conflicted with British and EC law); *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1952] 2 All E.R. 780 (C.A.), (court would not recognize and enforce U.S. court order where to do so "would destroy or qualify those statutory rights belonging to an English national" who was not subject to U.S. jurisdiction).

Australia: *The Jumbunna Coal Mine No Liability v. The Victorian Coal Miners' Association*, [1908] 6 Commonwealth Law Reports 309 at 363 (High Court of Australia) (statutes "are always read as being *prima facie* restricted in their operation within territorial limits").

Sweden: 1979 Swedish Act on Prohibition of Investments in South Africa and Namibia, Swed. Stat. 1979: 487; Swedish Ministry of Commerce, Prohibitions of Investments in South Africa and Namibia 50 (1979) ("In the event of collisions of laws, however, the basic principle, according to international law, must be not to coerce one's own legal subjects, when they are under the territorial jurisdiction of a foreign state, to actions incompatible with the legal system of that state.").

Switzerland: *Hachette Booksellers S.A. et al. v. Cooperative Buying and Distribution Assoc. of Tobacco and Newspaper Merchants et al.*, [1967] Arrêts du Tribunal Fédéral 93 II 192 (Supreme Court of Switzerland) (Federal cartel act limited to Swiss territory).

Germany: Brief Amicus Curiae of the Federal Republic of Germany, *Sterling Drug Inc. v. Bayer AG, et al.*, Nos. 92-7920 and 92-7970, 8 (2nd Cir., filed Oct. 29, 1992) ("The extraterritorial aspects of the [trademark and trade name] Injunction constitute a substantial and unwarranted interference with Germany's sovereign right to regulate activities within its territory.")

C. A Corollary Canon of Construction is That Absent a Clearly Expressed Intent to Override International Law, a Statute Should not be Construed To Do So.

Framed by international law, the corresponding canon of construction in the United States is that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains". *Alexander Murray v. Schooner Charming Betsy*, 6 U.S. 64, 116, 2 Cranch 64, 118 (1804) (Marshall, C.J.).

Canadian courts also construe statutes, if another reading is possible, not to violate international law. *See, e.g., Daniels v. White and The Queen*, [1968] S.C.R. 517, 541 (Supreme Court of Canada) *per* Pigeon J.; P-A Côté, *The Interpretation of Legislation in Canada* 308-09 (2d ed., 1991). The United Kingdom, as well as many other states, also follow this rule. *See, e.g., Mortensen v. Peters* [1906] 43 Scottish Law Reporter 872, 877 (Scottish Court of Justiciary) *per* Lord Kyllachy.

Statutes and treaties manifesting clear Congressional intent to override international law are the only exceptions to this rule. *See Diggs v. Shultz*, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973) (upholding statute permitting imports contrary to United Nations Security Council embargo). *Accord, United States v. Alvarez-Machain*, ___ U.S. ___ , 112 S. Ct. 2188 (1992) (treaty terms do not necessarily embody customary international law); *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court S.D. Iowa*, 482 U.S. 522 (1987) (construing the

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France: *Société Fruehauf Corporation v. Massardy et autres*, [1968] Recueil Dalloz Sirey-Jurisprudence 147; Gazette du Palais 1965.2.86 (Court of Appeal, Paris), *translated in* Andreas Lowenfeld, *Trade Controls for Political Ends* 93 (1983); *id.* at 99 (general principles of international law dictated that French company in France not subject to extraterritorially applied U.S. trade laws).

Netherlands: *Compagnie Europeene des Petroles S.A. v. Sensor Nederland B.V.*, 22 I.L.M. 66 (Hague Dist. Ct. 17 Sept. 1982) (extraterritorial scope of U.S. Siberian pipeline regulations to countermand law and policy in the Netherlands incompatible with territorial principle under international law).

Hague Evidence Convention as permitting a court not to employ the Convention before seeking and compelling discovery under the Federal Rules of Civil Procedure).

This exception is followed not only in the United States but in other jurisdictions as well. *See, e.g., Gordon v. Regina in Right of Canada*, [1980] 5 W.W.R. 668, 671 (British Columbia Supreme Court), *aff'd* [1980] 6 W.W.R. 519 (British Columbia C.A.) (upholding jurisdiction over U.S. citizen fishing in 200-mile Canadian "fishing zone." "[E]ven if the law of Canada contravenes 'customary international law,' if Parliament, as here, has acted unambiguously, the courts of this country are bound to apply the domestic law.") See also ***Mortensen v. Peters***, 43 Scottish Law Reporter 872, 877 (Scottish Court of Justiciary) (for expression of same exception in U.K jurisprudence).

D. This Court has Consistently Applied These Principles to Read Statutes With Jurisdictional Clauses Comparable to the Sherman Act to Respect The Territorial Preference.

A second, and related, canon is that statutes should not be construed to apply extraterritorially to conflict with foreign local law, absent a clearly expressed legislative purpose to the contrary. This is not only the law in the United States,[7] but in such other states as Canada and the United Kingdom.[8]

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7. *Foley Bros. v. Filardo*, 336 U.S. 281, 286 (1949) (refusing to apply the U.S. Eight Hour Law to a contract between the United States and a private contractor for construction work in the Middle East because Congress had not expressed a clear purpose to regulate labor conditions which are the primary concern of foreign jurisdictions).

8. For Canadian law *see, e.g.*, Driedger, ***The Construction of Statutes*** 166 (1974) ("There is a presumption that, in the absence of an intention clearly expressed or to be inferred from its language, or from the object or subject matter or history of the enactment, a legislature does not design its statutes to operate extraterritorially."); P-A Côté, ***The Interpretation of Legislation in Canada*** 170 (2d ed. 1991) ("Unless it is implicitly or explicitly provided otherwise, the legislator is presumed to enact for persons, property, judicial acts and events within the territorial boundaries of his jurisdiction."). For U.K. law *see, e.g., Regina v. Keyn*, [1876], 2 Ex.D. 63 (unless express assertion of authority otherwise, jurisdiction is territorial); F.A.R. Bennion, ***Statutory Interpretation***, § 130 at 263 (2d ed. 1992) ("Unless the contrary intention appears, and subject to any relevant rules of private international law, an enactment is taken not to apply to foreigners and foreign matters outside the territory to which it extends."); P. St. J. Langen, ***Maxwell on the Interpretation of Statutes*** 171 (12th ed. 1969) ("In the absence of an intention clearly expressed or inferred either from its language, or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate on its subject beyond the territorial limits of the United Kingdom.")

This principle has been consistently applied in the United States to statutes having jurisdictional clauses similar to that of the Sherman Act. It limits the jurisdiction of those statutes over foreign conduct by U.S. and foreign persons which could cause conflict between sovereign regulatory regimes.

In *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963), this Court refused to construe the words "between any foreign country and any State, Territory or the District of Columbia" (*i.e.*, foreign commerce) in the National Labor Relations Act ("NLRA") to extend to the maritime operations of foreign flagships employing a foreign crew, even though the Honduran corporation which operated the ships was controlled by the United Fruit Company, a New Jersey corporation, owned by U.S. citizens, and the ships transported fruit between Central and South America and the United States. The Court specifically recognized the "possibility of international discord" that could result from the concurrent, and possibly contradictory, application of the NLRA and the Honduran Labor Code. The Court concluded that in order "to sanction the exercise of local sovereignty under such conditions in this 'delicate field of international relations there must be present the affirmative intention of Congress clearly expressed.'"[9]

Last year, this Court once again affirmed this "clear expression" rule in *E.E.O.C. v. Arabian American Oil Co.* ("*Aramco*"), ____ U.S. ____, 111 S.Ct. 1227 (1991) (Title VII of the Civil Rights Act of 1964 held not to apply extraterritorially to regulate the employment practices of U.S. employers who

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9. *Id.* at 21–22, *quoting Benz v. Compania Naviera Hidalgo S.A.*, 353 U.S. 138, 147 (1957) (holding that the Labor Management Relations Act of 1947 did not apply to the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel was temporarily berthed in a U.S. port, absent a clear expression of legislative intent.)

employ U.S. citizens abroad). Although the potential conflict between the concurrent application of both U.S. and Saudi employment law was not specifically addressed, the Court did recognize that the purpose of the "clear expression" rule was "to protect against unintended clashes between our laws and those of other nations. . . ." *Id.* at 1230.

Title VII defined "commerce" as including commerce "between a State and *any place outside thereof*." *Id.* at 1232 (emphasis supplied). Although Title VII's definition of "commerce" was different from but no less broad than the Sherman Act's reference to "foreign commerce," the Court held that it was insufficient to prove that Congress intended the statute to apply to employers outside the United States. The Court further noted that it had "repeatedly" held that even statutes that expressly refer to *foreign* commerce do not necessarily apply abroad.[10]

10. *Id.* at 1232, *citing New York Central R.R. Co., v. Chisholm*, 268 U.S. 29 (1925) (refusing to construe the words "foreign commerce" to permit the estate of a U.S. employee to recover under the Federal Employers Liability Act from a U.S. railroad company for damages resulting from a railroad accident which occurred 30 miles north of the Canada-United States border). *Accord Lujan v. Defenders of Wildlife*, —— U.S. ——, 112 S.Ct. 2130, 2147 (1992) (Stevens, J., concurring in judgment, concluded that Section 7(a)(2) of the Endangered Species Act did not apply extraterritorially, because there was no clear indication that the provision was intended to apply in foreign jursidictions.)

The *Aramco* Court reconciled its holdings in *Chisholm* and *McCulloch* with *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286–87 (1952). In *Steele*, the Court found that far broader language—"all commerce which may lawfully be regulated by Congress"—justified the application of the Lanham Act to foreign conduct. The Court in *Steele* also specifically noted that, given the fact that Mexican courts had nullified defendant's Mexican Bulova trademark registration, application of the Lanham Act would not "impugn foreign law" or cause an "interference with the sovereignty of another nation." *Steele*, 344 U.S. at 289.

II. NEITHER THE PLAIN LANGUAGE NOR THE LEGISLATIVE HISTORY OF THE SHERMAN ACT DEMONSTRATES A CONGRESSIONAL INTENT TO APPLY IT EXTRATERRITORIALLY SO AS TO CONFLICT WITH AND UNDERMINE ANOTHER SOVEREIGN'S TERRITORIAL LAWS.

Like the NLRA and Title VII, the plain language and the legislative history of the Sherman Act manifest no Congressional intent to apply it to conduct regulated by a foreign sovereign within its territory, where to do so would undermine the foreign sovereign's laws.

Section 1 of the Sherman Act declares illegal contracts, combinations or conspiracies, "in restraint of trade or commerce among the several States, or *with foreign nations*." 15 U.S.C. § 1 (emphasis supplied). This language is no broader than that read with restraint in *Aramco, Chisholm,* and *McCulloch*. This, to many, should be sufficient to put an end to the issue of possible contrary legislative construction.

If one needs to look further, to the legislative history of the Sherman Act, one can question whether the Sherman Act was in fact intended to be applied extraterritorially at all. Congress cannot, however, be said to have shown any indication of an intent to override The Territorial Preference.[11]

11. None of the drafters of the Sherman Act suggested that it applied to conduct outside the territory of the United States regulated by the conflicting law or policy of another sovereign state. Senator George of Mississippi, one of the principals in the debate, was concerned that the Sherman Bill could permit wholesale evasion if it did not apply to agreements made outside the territory of the United States: "If the [anticompetitive] agreement be not made within the jurisdiction of the United States, as if it be made in Canada, it is not within the terms of the bill." Senator Sherman agreed that cartels formed outside the United States could not be reached but said the proceeds of those cartels realized within the United States could be. 21 Cong. Rec. 2461 (1890). It thus does not appear that overriding The Territorial Preference ever occurred to either Senators George, Sherman, or indeed to any other legislator responsible for the Act. *Accord, American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (which went considerably further and refused to apply the Sherman Act extraterritorially even absent foreign state regulation). *American Banana*, of course, has been substantially overruled as discussed in *W. S. Kirkpatrick v. Environmental Tectonics Corp.*, 493 U.S. 400, 407 (1990) (applying Foreign

Notwithstanding the legislative history, Canada understands that it is almost universally accepted through eighty years of Supreme Court jurisprudence that the plain meaning of foreign commerce in the Sherman Act provides for jurisdiction over foreign persons and some foreign conduct under the effects doctrine. Canada does not object to the assertion of U.S. antitrust jurisdiction to reach foreign conduct under the effects doctrine—so long as there is no conflict between U.S. and foreign local law.

III. NOR DOES THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1982, AMENDING THE SHERMAN ACT, EXPRESS AN INTENT TO OVERRIDE THE TERRITORIAL PREFERENCE IN SITUATIONS OF LEGAL CONFLICT UNDER U.S. AND INTERNATIONAL LAW.

In 1982, Congress amended the jurisdictional provisions of the Sherman Act to promote U.S. exports. The Foreign Trade Antitrust Improvements Act ("FTAIA")[12] exempts from Sherman Act jurisdiction conduct involving trade or commerce with foreign states where there is no direct, substantial and reasonably foreseeable effect on domestic, import or export commerce. 15 U.S.C. § 6a. The FTAIA does not say when U.S. courts do have antitrust jurisdiction, except by negative implication. The FTAIA is therefore similar to the alien exemption provision of Title VII discussed in *Aramco*: it eliminates a portion of the U.S. courts' jurisdiction, but does not increase or clarify the proper scope of the remaining jurisdiction.[13] In fact, the legislative

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Corrupt Practices Act extraterritorially).

12. The FTAIA specifically excludes from its scope conduct involving *import* trade or commerce. Import trade or commerce remains covered by the Act of 1890. The London reinsurance Petitioners were selling reinsurance and retrocessional reinsurance risk protection to U.S. insurance companies located in the United States. This probably constitutes the importation of reinsurance services into the United States.

13. Title VII's alien exemption provision clarified that the statute "shall not apply to an employer with respect to the employment of *aliens* outside any State." 111 S. Ct. at 1233–34 (emphasis supplied). The *Aramco* Court rejected Petitioners' contention that this provision should be construed by negative inference to mean that Congress intended to cover U.S. *citizens* working

history of the FTAIA establishes that Congress did *not* intend to modify the clear expression or any other applicable rule of jurisdictional limitation in determining the scope of Sherman Act jurisdiction in a case of proposed extraterritorial application:

> [T]he bill is intended neither to prevent nor to encourage additional judicial recognition of the special international characteristics of transactions. If a court determines that the requirements for subject matter jurisdiction are met, bill would have no effect on the courts' ability to employ notions of comity, *see, e.g., Timberlane Lumber Co. v. Bank of America*, 549 F.2d 1287 (3rd [sic] Cir. 1979), *or otherwise to take account of the international character of the transaction*.

H.R. Comm. on the Judiciary, H.R. Rep. No. 97-686, 97th Cong., 2d Sess. 13 (1982) (emphasis supplied).

IV. IN THE HUNDRED YEARS OF JURISPRUDENCE FOLLOWING PASSAGE OF THE SHERMAN ACT, THIS COURT HAS NEVER UPHELD SHERMAN ACT JURISDICTION OVER FOREIGN PERSONS ENGAGED IN PREDOMINANTLY FOREIGN CONDUCT WHERE THE EXERCISE OF SUCH JURISDICTION WOULD DIRECTLY CONFLICT WITH THE LOCAL LAWS AND POLICIES OF THE FOREIGN JURISDICTION.

This Court has not until now been presented with the assertion that the Sherman Act can override contrary foreign local law. To date, in the antitrust cases which this Court has considered, either the actors were located or a significant proportion of the conduct at issue occurred in the United States.[14] In those cases in which predominantly foreign actors

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abroad. *Id.*

14. For example, in *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), the agreement and significant overt acts occurred in the United States. *Id.* at 276. Moreover, the defendants did not claim that the imposition of U.S. antitrust law directly conflicted with Mexican law. *See* Brief of Petitioners, *United States v. Sisal Sales Corp.*, No. 200. Therefore, the Court had no occasion to address the issue of a possible override of The Territorial

and conduct were involved, a possible conflict of the two sovereign states' laws was not addressed.

The leading modern authority, ***United States v. Aluminum Co. of America*** ("*Alcoa*"), 148 F.2d 416 (2d Cir. 1945), presented no conflict. In *Alcoa*, Judge Hand, writing for a three judge panel hearing the case on certification from the Supreme Court, concluded that alleged combinations between Aluminium Limited, a Canadian company, and European aluminum producers would be unlawful under U.S. antitrust law, even if made abroad, "if they were intended to affect imports and did affect them." *Id.* at 444. If there had been a clear conflict of jurisdiction, however, it is unlikely that Judge Hand would have applied the Sherman Act under his "effects" test. He recognized that Sherman Act jurisdiction should be limited by conflict of laws considerations:

> [I]t is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws."

148 F.2d at 443.

Likewise, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), this Court found no conflict. In that case, a Canadian Government agency enlisted the Canadian subsidiary of the U.S. firm, Union Carbide, to help the Canadian agency purchase and allocate wartime supplies of a rare metal. The U.S. plaintiff, a competitor of Union Carbide, claimed antitrust injury because Carbide's subsidiary bought none of its metal. As the Court indicated, there was no question of the propriety of exercising U.S. jurisdiction over the Canadian subsidiary because it was not a party to the suit, having never been served. *Id.* at 706. The Court found no jurisdictional limitation; there was no evidence that the Canadian Government had directed or approved of the discriminatory buying practices. There was no communication to the U.S. courts

NOTES (*Continued*)

Preference. *See* Brief of the United States, *United States v. Sisal Sales Corp.*, No. 200 at 27.

declaring a Canadian interest in conflict with U.S. enforcement (in contrast to the British Government's brief here). By implication, if a clear sovereign policy interest were manifested, The Territorial Preference would apply.[15]

V. REPUDIATING THE TERRITORIAL PREFERENCE ABSENT CLEAR LEGISLATIVE DIRECTION TO DO SO COULD INVITE FOREIGN EXTRATERRITORIAL COUNTERMEASURES AGAINST U.S. TERRITORIAL SOVEREIGNTY UNDERMINING IMPORTANT U.S. INTERESTS.

The United States has a vital interest in applying its laws to conduct by persons within its borders. The United States has responded to certain foreign political boycotts by prohibiting United States persons from furnishing boycotting countries with information concerning the race, religion, sex, or national origin of any other United States person. Export Administration Act, 50 U.S.C. App. § 2407 et seq. (1988). Would the United States not consider it a serious infringement of law if a boycotting country attempted to seize and prosecute a resident in the

15. Nor can it have mattered if the Canadian Government had instructed an official of the Canadian subsidiary to buy only from Union Carbide and had communicated this instruction while the subsidiary's official was on a buying trip in Colorado. Limited ministerial acts in the United States would not, in this circumstance, confer U.S. jurisdiction.

Canada agrees with the United States Solicitor General that a statement to the Court by a friendly foreign sovereign should be given dispositive weight in determining whether conduct was mandated by the sovereign in accordance with its laws. Brief for the United States as Amicus Curiae in Support of Petition for Certiorari in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, No. 83-2004 at 17. It should be equally dispositive if the foreign sovereign asserts that there is a jurisdictional conflict, short of mutually incompatible complusion. For example, where there is a governmental request, or the establishement of a scheme of regulation requiring primacy of territorial jurisdiction, the statement by the foreign sovereign should suffice. *See* J.S. Stanford, (then Director General, Bureau of Commercial and Commodity Relations, External Affairs of the Government of Canada, now Canadian Deputy Solicitory General, speaking in his private capacity), "The Application of the Sherman Act to Conduct Outside the United States: A View From Abroad," 11 Cornell Int'l L.J. 195, 203 (1978) (a limited interpretation of the defense of foreign compulsion "seems to place the government of free enterprise economies at a disadvantage in relation to governments that practice a more interventionist policy").

United States complying with this U.S. law? Repudiation of The Territorial Preference, it would appear, threatens U.S. interests in effectively governing sovereign U.S. territory no less than the interests of other states in maintaining sovereignty within their own territories.

VI. EVEN IF THE DISTRICT COURT HAD JURISDICTION UNDER THE SHERMAN ACT TO HEAR THESE CLAIMS, INTERNATIONAL LAW AS EMBODIED IN U.S. LAW REQUIRES THAT IT REFRAIN FROM DOING SO.

A. A Direct Conflict of Law Poses a Fundamental Jurisdictional Issue and Cannot be "Balanced."

Where two sovereign states assert concurrent conflicting jurisdiction over the same conduct, it is not a question of mere politeness between two states. As a jurisdictional issue, conflicts of law should not be "weighed" or "balanced" against other national or international interests. Too often, as in the decision below, the result is virtually predetermined.[16] As this Court recognized in *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 19 (1963), adopting a "balancing" test under such circumstances "would project the courts into application of the sanctions of the Act to foreign-flag ships on a purely ad hoc weighing of contacts basis" and "would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice."[17] This Court

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16. *See* James R. Atwood & Kingman Brewster, *Antitrust and American Business Abroad* 166 (2d ed. 1981). Conflicts between the laws of nations should be "an integral part of the jurisdictional issue." The "bulk of international scholarship historically treated comity as a qualification on the scope of a state's legislative jursidiction." *Id*. National courts should not undermine the regulatory framework or policies of foreign sovereigns within their territory. *See e.g.* Address by the then Australian Attorney-General Senator Peter Durack, Q.C. to the American Bar Association, 12 August 1981, "Australia: 'Extraterritorial Application of United States Law,'" *reprinted in*, Lowe, *Extraterritorial Jurisdiction*, 90, 94 (1983) ("But it is not merely that the court lacks the expertise; it is rather that it is not part of the judicial function to decide whether a law or policy is justified by what a court conceives to be in the national interest.").

17. Judicial balancing of interest and contacts is a time tested method for resolving conflicts of laws where jurisdiction is concurrent but not conflicting,

should reject the Ninth Circuit's balancing test as applied here, as it rejected the balancing test of the National Labor Relations Board in *McCulloch*. *Id*.

B. At A Minimum, Sovereign Regulatory Conflicts Must be Accorded Substantially Greater Weight Than Other Factors in a Conflict of Laws Balancing.

Even if The Territorial Preference in a sovereign jurisdictional conflict were to be balanced against other factors, however, it should be accorded substantially greater weight than it was accorded by the Ninth Circuit. The one case in which the Supreme Court has balanced conflicting sovereign interests was *Société Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 212 (1958). There, in contrast to this case, the Court unquestionably had jurisdiction; indeed, the foreign party was the plaintiff. The issue was whether the district court could dismiss the plaintiff's claim based on a failure to produce documents whose production was prohibited by the law of Switzerland, the foreign state in which the documents were located. The Court applied The Territorial Preference and refrained from coercing foreign discovery as the price of maintaining the U.S. suit. If The Territorial Preference is theoretically open to balancing, the rationale of ***Rogers*** should restrict the exercise of extraterritorial jurisdiction in this case.

CONCLUSION

This Court has consistently applied principles of United States and international law to limit claims by private parties and executive officials that they are free to apply U.S. law abroad, in spite of the consequences to other sovereign states within their

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or where one forum is less convenient than the other. It has not succeeded where it has been used to override The Territorial Preference. Because sovereign conflict balancing is inappropriate where basic subject matter jurisdiction is at issue does not mean that U.S. courts should be free, absent clear legislative expression, to ignore The Territorial Preference and simply assert jurisdiction. Canada notes that, in *Laker Airways v. Sabena, Belgium World Airlines*, 731 F.2d 909, 948–950 (D.C. Cir. 1984), the court failed to consider the precedents cited herein; in Canada's view, the result in that case was not in accordance with U.S. and customary international law.

territories. This Court has, until now, required a clear expression of Congressional authorization for such enforcement before approving it. Nothing in the Sherman Act, as amended, authorizes a departure from this tradition. This case provides a rare and important opportunity to reaffirm, in this modern day of unprecedented and increasing global interdependence, the strong and continuing connection between United States and international law in addressing international jurisdictional conflicts.

Accordingly, the judgement of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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November 19, 1992

Nos. 91-1111 and 91-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., *et al.*,
Petitioners,
v.
STATE OF CALIFORNIA, *et al.*,
Respondents.

MERRETT UNDERWRITING AGENCY MANAGEMENT LTD., *et al.*,
Petitioners,
v.
STATE OF CALIFORNIA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF CASUALTY & SURETY AGENTS, NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, AND INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Do domestic insurance companies whose conduct otherwise would be exempt from federal antitrust laws under the McCarran-Ferguson Act lose that exemption because they participate with foreign reinsurers in the business of insurance?

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INTEREST OF THE *AMICI*[1]

Amici curiae National Association of Casualty & Surety Agents, National Association of Professional Insurance Agents and Independent Insurance Agents of America, Inc., are non-profit trade associations that represent hundreds of thousands of insurance agents and their employees throughout the United States. *Amici*'s members are independent agents who work at all levels of the insurance market with numerous insurance carriers, rather than in exclusive arrangements with one carrier. *Amici* submit their brief to supplement the arguments made by Petitioners on the one issue presented that is of particular concern to *amici* and their clients: whether McCarran-Ferguson immunity is forfeited solely by the participation in the regulatory process of an entity unregulated by the state.

Insurance agents serve as the only integrated point of contact in the insurance marketplace. In order to satisfy their customers' needs, agents interpret, compare, and administer insurance policies, and they strive to improve insurance availability and coverage. Agents also work daily with insurance company forms and policies. Insurance agents thus have an important interest in promoting policy reform that responds to the needs of both their companies and their customers—and in maintaining a regulatory system that facilitates such reform.

Insurance agents and their trade associations provide extensive information and expertise to advisory organizations which, in turn, compile data from a variety of sources for the ultimate benefit of state regulators, who rely on advisory organizations to learn about insurance policies and practices. Insurance agent representatives regularly meet with advisory organizations to suggest

[1] Petitioners and respondents have consented to the filing of this *amicus* brief. Their letters of consent are being lodged with the Clerk.

how insurance coverage can be enhanced, to comment upon the impact of proposed forms, and to provide counsel on issues of technical importance. Often *amici*'s advisory activity is performed in public fora, for example, in hearings before regulators and through mailings and press releases. This case is important to these *amici* because the Court of Appeals' decision threatens both the ability of advisory organizations, like petitioner Insurance Services Office, Inc. ("ISO"), to freely gather information for ultimate use by state regulators, and also the participation of insurance agents and their trade associations in the state-regulated business of insurance.

INTRODUCTION AND SUMMARY OF ARGUMENT

Advisory organizations have historically been enlisted in state efforts to regulate the insurance industry. Such organizations are numerous and the roles they play in the industry are diverse. For example, petitioner ISO provides policy forms used in a wide range of property and casualty insurance coverages, and the National Council on Compensation Insurance ("NCCI") specializes in workers compensation issues. Often pursuant to express statutory mandates, ISO and NCCI play an important role in developing, and recommending to state regulators, proposed policy forms—the standardized components that, when taken together, compose an insurance contract.[2] Other advisory organizations include the

[2] Standardization of policy forms is a vital and valid state regulatory goal. It permits insurance agents and their customers more easily to compare competing insurance policies and, therefore, to exercise more informed choice over their purchasing decisions. It establishes minimum components that can be modified or supplemented by competing insurance companies. Standardization is particularly important in that it is increasingly necessary for commercial insureds, in particular, to seek policies from several carriers. It is thus imperative that there be a clear industry-wide understanding of what is necessary for various policy forms and that there be a high degree of commonality in language and applicability so that the entire package of coverage fits together to the satisfaction of the insured.

National Industry Committee on Automobile Insurance Plans and the National Committee on Casualty and Property Insurance. These organizations collect information and develop plans of operation for the automobile and property residual markets in each state; state commissioners rely upon their work to facilitate the process of fashioning policy that is uniform, where desirable, and crafted to suit their state's particular needs where appropriate. The International Association of Industry Accident Boards and Commissioners, another example, works at the national level to develop workers compensation policies and procedures for use by state legislatures and regulators in developing coordinated workers compensation policies. And the American Association of Insurance Services serves the same function as ISO for smaller companies principally serving rural communities.

In carrying out their valuable work, advisory organizations have long sought comments on proposed policy forms from a wide body of interested parties in the insurance industry. The purpose of such consultation is straightforward: a fully informed process aids the advisory organizations and, in turn, the state regulators who seek their advice. The ultimate beneficiary, of course, is the consumer, who gains from knowledgeable and successful insurance regulation. Open dialogue is vital to the success of the advisory process—without regard to whether suggestions come from a licensed or unlicensed entity within or beyond state insurance jurisdiction. A good idea is, after all, a good idea regardless of its source.

The marketplace of ideas assumes that the best ideas will be translated into action. But discussion and acceptance of new proposals can easily lead to charges of "conspiracy"—an elastic term of uncertain meaning whose mere appearance on a court pleading can lead to years of burdensome litigation and can deter legitimate behavior. Preventing that result, the antitrust exemption

contained in the McCarran-Ferguson Act permits advisory organizations to fulfill their designated function by engaging in consultation with all groups whose views would be of interest to the state regulators themselves—insurers, reinsurers, insurance agents, brokers, buyers, claimants, and other regulators.

The decision below would eliminate the antitrust immunity provided by the McCarran-Ferguson Act whenever unregulated entities participate in otherwise immunized conduct. But there are at least three reasons why McCarran-Ferguson protection applies without regard to whether a specific entity in the insurance business is within or without the regulatory reach of a particular state insurance regulator. *First*, this limitation on immunity would impair the ability of states to regulate the business of insurance on an informed basis by obtaining information from unregulated entities through advisory organizations. *Second*, states have full authority to regulate the impact of foreign insurers, and other nonregulated insurance entities, on the insurance buying public. *Third*, the decision below would violate the settled principle recognized by this Court that applicability of antitrust immunities depends on the nature of the challenged activity, not on the identity of the participants.

ARGUMENT

In relevant part, the McCarran-Ferguson Act provides an antitrust exemption for "the business of insurance," to the extent that insurance activities are "regulated by State law." 15 U.S.C. 1012(b). The Ninth Circuit ruled that the "state regulation" component could not be met in this case because immunity was forfeited as a result of ISO consultation with foreign reinsurers "beyond the jurisdiction of the states." Pet. App. at 19a.[3] By so ruling, the Ninth Circuit effectively turned a geographic limit on state regulatory jurisdiction into a substantive limit on the scope of the McCarran-Ferguson exemption. The Ninth Circuit decision imperils the ability of advisory organizations to collect the views of interested parties and to pass them along to state regulators, and it more generally impairs the authority of states to regulate insurance-related activities that legitimately involve unregulated entities.

First, denial of McCarran-Ferguson immunity undermines the basic purpose of the Act—to facilitate informed decisions by insurance companies and by regulators. The McCarran-Ferguson Act ensures that cooperative activities within the insurance industry are conducted "in an *informed* and responsible way." *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979) (emphasis added). Congress equally sought to protect the ability of state regulators to gather the information they need to regulate responsibly. The overall legislative goal was to protect "the type of state regulation that centers around the contract of insurance . . . [including the] relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement." *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969).

[3] Alternatively, the Ninth Circuit held that the actions of the petitioners constituted a "boycott." Action that constitutes a boycott does not, of course, enjoy the protection of McCarran-Ferguson antitrust exemption, *see* 15 U.S.C. § 1012(b), and this Court has separately granted certiorari to consider the boycott issue. Certain counts of the complaint do not allege any boycott, and in any event, regardless of the resolution of the boycott question in other counts, these *amici* believe that the Court should resolve the issue addressed in this *amicus* brief. If merely vacated, the Ninth Circuit ruling and the public position taken by state law enforcement agencies in this litigation would continue to chill open communication between state regulators, advisory groups and entities in the insurance business. Once provided with the benefit of full briefing and oral argument, this Court should rule definitely whether the Ninth Circuit correctly held that the presence of foreign insurers had, by itself, caused the forfeiture of McCarran-Ferguson immunity.

Permitting advisory organizations freedom to consult with knowledgeable parties advances the goal of informed state regulation centered around the insurance contract. A number of states expressly authorize advisory organizations like ISO or NCCI to "[p]repare and file policy forms and endorsements and consult with members, subscribers and others relative to their use and application." Ark. Stat. Ann. § 23-67-116; Haw. Rev. Stat. § 431:14-107-1; Me. Rev. Stat. Ann., tit. 24-A § 2321-D; Miss. Code Ann. § 83-2-15; *see also* Ken. Rev. Stat. Ann § 304.13-121 (permitting advisory organizations to consult with "members and others" on use of policy forms); Wyo. Stat. § 26-14-109 (also permitting advisory organization to consult with "members, subscribers and others" on policy forms).[4] The meaning of the statutory reference to "others" is plain: advisory organizations are permitted to consult with any interested party, like the *amici* here, in order to provide the state insurance regulators with the best

[4] The State of Colorado has given advisory organizations even broader responsibilities, establishing a statutory right for any aggrieved party to file a complaint with an advisory organization to obtain review of "the manner in which the [policy form] has been applied with respect to insurance afforded him." Colo. Rev. Stat. § 10-4-418.

possible advice. The states are free to accept, reject or modify that advice.[5]

Statutory authorization of consultation with an unlimited range of people simply tracks common sense. The task entrusted to advisory organizations—to advise regulators on matters of insurance policy—cannot be performed without consultation with all those involved in the purchase and supply of insurance contracts, including reinsurers (who are asked to supply layers of coverage) and insurance agents (who are asked to explain, sell and service that coverage).

This consultative process goes to the heart of the McCarran-Ferguson exemption because it bears the imprimatur of state regulators and deals directly with the meaning and content of the insurance contract. The issue is not, as the Ninth Circuit concluded, whether states can directly regulate foreign insurers. State regulators have, through an advisory organization, invited reinsurers to provide their views about the terms and conditions of insurance contracts. States have ample authority to oversee this process to ensure that it does not become a vehicle for illegal agreements victimizing the consumers protected by state insurance laws. Because each state has jurisdiction over the challenged practice—the manner in which an advisory organization formulates advisory policy forms—the "state regulation" requirement is fully satisfied.

[5] The uncontested allegations of this case illustrate that consultative process between ISO and state insurance regulators. After ISO proposed standardized Commercial General Liability forms, various insurance departments held continuing discussions with ISO concerning the content of the proposed forms, ISO prepared revisions of the proposed forms, and, finally, states decided whether to approve the forms. Petition for a Writ of Certiorari, Hartford Fire Insurance Co., et al., at 4-6.

Artificial limits on antitrust protection for this process would only constrict the flow of information to insurance regulators and impair their ability to function effectively. If consultation with those not directly regulated by states would strip McCarran-Ferguson protection from *all* participants in that process, advisory organizations can be expected to become wary of consulting with anyone except regulated domestic insurance companies. Foreign reinsurers, for example, represent a repository of experience that is invaluable to advisory organizations evaluating issues to be considered by a host of states. A crabbed interpretation of McCarran-Ferguson protection would inevitably discourage the dialogue essential to make this process work and would subvert the consumer interest in a fully informed advisory system.

Second, denial of McCarran-Ferguson in this instance rests on a fundamental misunderstanding of the nature of insurance regulation. Because insurance policies are ultimately provided to the public by an entity (agent, broker or insurer) whose activities are entirely within the ambit of state regulation, the state retains the complete ability to regulate the impact of insurance practices on the public. Thus the Ninth Circuit was fundamentally confused when it equated jurisdiction over a foreign insurer with the ability to control the impact of foreign insurers on the state's citizens.

The decision below turned on the false assumption that agreements that include domestic insurance companies cannot be regulated if one party to that agreement is a foreign reinsurance company beyond the direct reach of state regulation. Through statutes generally proscribing unfair insurance practices and otherwise, state regulators have complete authority to regulate the impact of insurance practices on their citizens, even if one aspect of that impact can be derivatively traced to a foreign insurer.

For example, even before passage of the McCarran-Ferguson Act, states regulated the relationship between domestic insurance companies and foreign reinsurance companies, requiring, for example, domestic insurance companies to obtain approval of reinsurance agreements with such companies. *Taggart v. Keim*, 103 F.2d 194, 196 (3d Cir. 1939); *Ballou v. Davis*, 75 F.2d 138, 140 (7th Cir.), *cert. denied*, 295 U.S. 766 (1935). State regulation of that relationship continues today because agreements with reinsurance companies, whether domestic or foreign, directly affect the reliability and solvency of regulated domestic insurance companies. *E.g.*, *Coppage v. Resolute Ins. Co.*, 264 Md. 261, 285 A.2d 626 (1972) (interpreting statute requiring regulatory approval of certain reinsurance contracts); *see generally* 19 *Couch on Insurance 2d* § 80:20, at 636-37 (1983); 13A J. Appleman & J. Appleman, *Insurance Law and Practice* § 7682, at 489-90 (1976). Indeed, states have broad authority over dealings between domestic insurers and *all* types of entities not directly subject to state insurance regulation. *Ford Motor Co. v. Insurance Comm'r of Pennsylvania*, 874 F.2d 926, 940-45 (3d Cir.) (upholding state prohibition of affiliations between domestic insurance companies and out-of-state financial institutions), *cert. denied*, 493 U.S. 969 (1989). As an example, the National Association of Insurance Commissioners has adopted a model Insurance Holding Company System Regulatory Act that more than 50 states and territories have adopted in whole or in part, and Section 5(A)(2)(c) of the model Act provides for state regulatory review of reinsurance agreements entered into by domestic insurers.

State regulation of surplus lines insurance follows the same pattern. A surplus line insurance company is one which is not authorized to do business within the state but is licensed in its own state for the purpose of providing excess insurance. In most states, surplus line insurance may be legally placed only when the full amount

of coverage is not (with diligent effort) available from a domestic insurer. In this manner, surplus lines insurers bring additional capacity to the insurance marketplace. Many such insurers are foreign entities. States traditionally control the impact of their activities by regulating the activities of the surplus lines broker, a domestic entity whose placement of coverage with a foreign insurer is fully within the regulatory jurisdiction of the relevant state.[6]

This means of indirect control is apparent in the uncontested allegations of this case. It is admitted that, even after the alleged agreement between domestic and foreign insurers to offer coverage of only a certain kind through a particular insurance form, state insurance regulators decided whether to approve the use of the form. *See supra* note 5. By such decisions, state insurance regulators can control the impact of the actions of foreign reinsurers by regulating the entity, here an advisory organization, that is well within their jurisdiction.[7]

In sum, the McCarran-Ferguson Act's "purpose was broadly to give support to the existing and future state systems for regulating . . . the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946); *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 299-301 (1960).[8] Against this background, it would be

[6] For example, states commonly prohibit brokers from placing insurance with a financially unsound surplus line insurer or an insurer with capital stock and surplus amounts below a set minimum level. *E.g.*, *Sternoff Metals Corp. v. Vertecs*, 39 Wash. App. 333, 693 P.2d 175, 180 (1984). Some states also have a list of approved insurers that are permitted to supply excess and surplus coverage.

[7] Of course, if a foreign reinsurer's actions were found to constitute a boycott, McCarran-Ferguson protection would be lost. *See* 15 U.S.C. § 1012(b).

[8] Although Congress recognized that states lack the power to directly regulate contracts of reinsurance entered into outside

absurd to contend that McCarran-Ferguson called into question the states' longstanding authority to regulate the arrangements made by domestic insurers or advisory organizations with foreign insurers—just as the Act did not diminish the power of states to invite non-regulated entities to participate in collective activities with regulated entities. So long as the relationship with unregulated entities is part of the business of insurance, the participation of unregulated entities does not offend the purposes of McCarran-Ferguson.

Third, contrary to this Court's precedent, the decision below improperly focusses on the identity of the parties to the challenged conduct rather than on the nature of that conduct. Indeed, the Court has recognized in other contexts that providing immunity for one party to a protected activity but not another thwarts the purpose of the immunity. Hence the antitrust laws concentrate on "the nature of the activity challenged, rather than on the identity of the defendant." *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 58-59 (1985).

In that case, the Court held that Congress did not intend the Sherman Act to compromise the right of states to regulate collective common carrier ratemaking and, therefore, both state regulators and also common carriers engaged in collective ratemaking must be protected when they engage in regulated activities. *Id.* at 56-57. By the same token, because Congress intended the McCarran-Ferguson Act to protect the right of states to regulate the business of insurance, both the subjects of regula-

their own jurisdiction, H.R. Rep. 143, 79th Cong. 1st Sess. 3 (1945), *quoted in FTC v. Travelers Health Ass'n*, 362 U.S. at 300-01, nothing in the legislative history of the McCarran-Ferguson Act indicates that Congress understood that states lacked the authority to regulate contracts with foreign reinsurers when there was a reasonable connection with state regulatory authority over domestic insurance companies.

tion and other insurance participants in the regulatory process must be protected. As explained above, the terms on which regulated entities deal with non-regulated entities are fully subject to state regulation. *See supra* pages 9-12.

Consistent with this principle, the Act's language "refers not to persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance.'" *SEC v. National Securities, Inc.*, 393 U.S. at 459 (emphasis in original). It would frustrate the purpose of the McCarran-Ferguson Act to strip immunity from domestic insurance companies otherwise entitled to this protection merely because they dealt with foreign insurance companies or other non-regulated entities in the business of insurance.

The Court has repeatedly recognized that an agreement between an exempt and non-exempt entity is *not* automatically outside an antitrust exemption. When it held that an insurance company's agreement with a pharmacy was not part of the business of insurance, the Court commented by way of analogy that "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. at 231.

The origin of this analogy demonstrates, however, its inapplicability here. The labor union cases cited in support of the *Royal Drug* statement, 440 U.S. at 231-32, hold only that agreements with non-exempt entities lose the traditional labor-union immunity *if* they are not the kind of agreements that the exemption was intended to protect. Thus, it is "beyond question that a union may conclude a wage agreement with a multi-employer bargaining unit without violating the antitrust laws," and the immunity is not available only for *certain types of agreements* with non-exempt employers. *United Mine Workers v. Pennington*, 381 U.S. 657, 664 (1965).

Similarly, the citation in *Royal Drug* to the exemption for agricultural cooperatives, 440 U.S. at 231-32, invokes precedent holding that an agreement between an exempt agricultural cooperative and non-exempt parties is lawful under the Capper-Volstead Act as long as it facilitates protected marketing activities without unreasonably restraining trade. *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 466-67, 471-72 (1960). The exemption is lost only if an agricultural cooperative enters an agreement with an entity that does not produce agricultural products, *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1976).

These cases support the *Royal Drug* holding that an agreement between an insurer and non-insurance entity is beyond the scope of McCarran-Ferguson. But here, unlike *Royal Drug*, it is undisputed that all of the entities were found to be in the business of insurance [9] and, therefore, antitrust immunity should apply.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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November, 1992

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[9] *In re Insurance Antitrust Litigation*, 938 F.2d 919, 927 (9th Cir. 1991).

No. 91-1128

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, *et al.*,
Petitioners

v.

STATE OF CALIFORNIA, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Did the court of appeals properly assess the extraterritorial reach of the U.S. antitrust laws in light of this Court's teachings and contemporary understanding of international law when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?

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Having obtained the written consent of the parties pursuant to Rule 37.2 of the Rules of this Court,[1] the Government of the United Kingdom of Great Britain and Northern Ireland ("British Government") submits this brief as *amicus curiae* in support of the Petitioners in No. 91-1128.

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[1] The letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

The British Government has a substantial interest in expressing to the Court its views with respect to this proceeding. The direct focus of the three claims under the U.S. antitrust laws to which the Petitioners' brief and this *amicus* brief pertain is business activity by British citizens within the London reinsurance and retrocessional insurance markets. Moreover, the Respondents' requested relief contemplates injunctions restricting certain conduct in London by the British defendants and, where applicable, their U.S. parents, as well as treble damages.

It is undisputed that British legislation contains extensive provisions regulating the conduct of this same British insurance business. As the district court correctly pointed out, the subject of the three antitrust claims at issue exists "in a regulatory and competitive framework established by the British Government." A 72,[2] 723 F. Supp. 464, 488 (N.D. Cal. 1989). The court of appeals, like the district court, acknowledged that, therefore, application of the U.S. antitrust laws to the London reinsurance market based on the claims at issue here would lead to significant conflict with English law and policy. A 29, 938 F.2d 919, 933 (9th Cir. 1991). Nonetheless, the court of appeals concluded that the requisite effects on U.S. commerce existed and that comity did not require abstention from the exercise of jurisdiction over the claims.

It has long been the policy of the British Government to cooperate with the U.S. Government and the U.S. courts in civil and commercial matters involving conduct deemed to be improper under the laws of both countries.

[2] All citations are to the Appendix to the Petition for a Writ of Certiorari.

Unfortunately, however, the assertion of certain claims of extraterritorial jurisdiction in antitrust proceedings in the United States has, from time to time, given rise to significant disagreements between U.S. antitrust claimants, on the one hand, and the British authorities, on the other.

British courts have recognized that British subjects who violate U.S. antitrust laws in certain circumstances may be subject to the jurisdiction of U.S. courts. However, British courts have taken the position that they should "insist on keeping the United States statutory provisions of the Sherman and Clayton Acts within the territorial jurisdiction of the United States in accordance with accepted standards of international law." *Midland Bank PLC v. Laker Airways Ltd.*, [1986] 2 W.L.R. 707, 726 (C.A.) (Dillon, L.J.).

The firm opposition of the British Government to such extraterritorial exercises of jurisdiction was manifested in the enactment by Parliament in 1980 of the Protection of Trading Interests Act.[3] When submitting the Protection of Trading Interests Bill to the British Parliament, the then-Secretary of State for Trade stated that the objective of the Bill was

> to reassert and reinforce the defences of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us. From our point of view, the most objectionable method by which this is done is by the extraterritorial application of domestic law.
>
> * * * *
>
> [T]he practices to which successive United Kingdom Governments have taken exception have arisen in the case of the United States of America. We have not suddenly become belligerent or confrontational in regard to this most powerful and valued friend. The

[3] 1980, ch. 11 (Eng.).

> Bill is a response to a situation of a very particular nature which has been developing over several decades and which in the past few years has become more acute.[4]

This law, *inter alia*, prohibits enforcement by U.K. courts of certain foreign judgments involving the award of multiple damages and, in certain circumstances, entitles British citizens and businesses against whom foreign courts have awarded multiple damages to recover the noncompensatory element of the judgment from the plaintiff through an action in a U.K. court.[5] Its enactment demonstrates the profound interest which the British Government has in cases like the instant proceeding.

In 1978, the Department of State, at the suggestion of the Clerk of this Court,[6] encouraged foreign governments to present their views with regard to pending judicial proceedings directly to the U.S. courts.[7] Since then, friendly foreign governments have relied on the State Department's position and have submitted briefs *amicus curiae* in this and other relevant U.S. courts.

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[4] Comments of the Secretary of State for Trade, 973 Parl. Deb., H.C. (5th ser.) 1533 (1979).

[5] The Protection of Trading Interests Act 1980 and Exchange of Diplomatic Notes Concerning the Act, 21 I.L.M. 834 (1982); *see also, e.g.*, A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 Am. J. Int'l L. 257 (1981).

[6] Letter from Solicitor General McCree to Legal Adviser Hansell (May 2, 1978), *reprinted in* U.S. Dep't of State, 1978 *Digest of United States Practice in International Law* 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 125 (1979).

[7] Department of State Circular Diplomatic Note to Chiefs of Mission in Washington, D.C. (Aug. 17, 1978), *reprinted in* U.S. Dep't. of State, 1978 *Digest of United States Practice in International Law* 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 124 (1979). *See also* Letter from Deputy Legal Adviser Marks (June 15, 1979), *described in* 73 Am. J. Int'l L. 669, 678-79 (1979).

This *amicus* brief is submitted to inform this Court of the British Government's views and to support the Petitioners' request for reversal of the court of appeals' decision. It is the essence of the British Government's position that the conduct of the British industry in the London reinsurance market is for the British Government to regulate. Therefore, the decision of the court below constitutes an interference with the sovereign rights and interests of the British Government. That decision is, with all due respect to the court below, erroneous and damaging to the principles of international law and comity to which this Court has accorded great significance in the past.

STATEMENT OF THE CASE

The complete background of this proceeding has been briefed by the parties. This *amicus* brief addresses solely the jurisdictional issues relevant to the British defendants which are raised in the brief filed on behalf of Petitioners in No. 91-1128.

As the district court observed, the following allegations of the complaints in these antitrust cases are relevant to activity by British citizens in the United Kingdom:[8] The Fifth Claim alleges that the defendant London reinsurers agreed to restrict the terms on which reinsurance would be written and to refuse to reinsure certain risks. The Sixth Claim alleges that, at a meeting in London, the British defendants agreed that all North American casualty reinsurance treaties would be written with a pollution exclusion. The Eighth Claim alleges that in 1987 a group of London retrocessional reinsurers agreed to boycott retrocessional reinsurance treaties that

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[8] The Fifth, Sixth and Eighth claims described in the text refer to the "California-style" complaints. The comparable claims are the Third, Fourth and Fifth claims of the "Connecticut-style" complaints. *Amicus'* statements apply as well to the corresponding claims in other complaints including those brought by private plaintiffs.

included certain North American property risks unless the original insurance contained certain exclusions. A 65-67, 723 F. Supp. at 484-85.[9]

Relying on the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1988) ("FTAIA"), the district court held that the challenged foreign conduct of the British defendants was subject to jurisdiction under the FTAIA because plaintiffs adequately alleged that:

> a decision not to provide reinsurance or retrocessional reinsurance to cover certain types of risks in the United States has a direct effect on the availability of primary insurance in the United States.

A 70, 723 F. Supp. at 486.

However, applying the three-part test laid down by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613-14 (9th Cir. 1976) (*"Timberlane I"*), *after remand* 749 F.2d 1378, 1382-83 (9th Cir. 1984) (*"Timberlane II"*), *cert. denied*, 472 U.S. 1032 (1985), the district court concluded that, upon consideration of the international comity factor of the test, extraterritorial jurisdiction should not be asserted. The court pointed out that the longstanding practices in the London reinsurance market challenged by the complaints were "openly conducted in conformity with English law" and were "directed primarily at reducing [the British defendants'] exposure to certain risks and controlling losses, a legitimate business purpose." A 73, 76, 723 F. Supp. at 488, 490.

The district court reasoned that:

> [E]nforcement of the antitrust laws against activities in the London reinsurance market would lead to significant conflict with English law and policy. This conflict, unless outweighed by other factors in the comity analysis, is itself a sufficient reason to decline exercise of jurisdiction. *Timberlane II*, 749 F.2d at 1384.
>
> * * * *
>
> The foregoing analysis leads to the conclusion that the conflict with English law and policy which would result from the extraterritorial application of the antitrust laws in this case is not outweighed by other factors. Although the conduct complained of had effects within the United States, it is not alleged to have excluded competitors from markets or denied consumers access to markets, and it is not alleged to have occurred for that purpose.

A 75, 77-78, 723 F. Supp. at 489-90.

Accordingly, the district court dismissed these claims against the British defendants for lack of subject matter jurisdiction.

On plaintiffs' appeal, a panel of the court of appeals affirmed the district court's holding that the alleged effects in the United States were sufficient under the FTAIA, A 27, 938 F.2d at 932, but reversed the district court's ruling that there should be a dismissal on the basis of international comity.[10] In assessing whether comity should be deemed to preclude exercise by the U.S. courts of subject matter jurisdiction over the aforementioned Fifth, Sixth and Eighth claims, the panel opinion reasoned that the enactment of the FTAIA had a profound effect on the *Timberlane* comity test, as follows:

> . . . We do not believe a *Timberlane* analysis (see *infra*) can be unaffected by the statute. If a complaint survives the new bar of 15 U.S.C. § 6a because

[9] A separate count in the complaint alleging that all defendants participated in a single "global" conspiracy was dismissed by the district court. A 65, 723 F. Supp. at 484. That dismissal was affirmed by the court of appeals, which directed that on remand plaintiffs should be afforded the opportunity to amend their complaint. A 26-27, 938 F.2d at 931.

[10] The British Government filed in the court below an *amicus curiae* brief, as well as a brief in support of the London reinsurer defendants' petition for rehearing and suggestion for rehearing en banc.

> the conduct has "a direct, substantial, and reasonable [sic] foreseeable effect" on American commerce, it is only in an unusual case that comity will require abstention from the exercise of jurisdiction. But as the legislation does not eliminate comity, a court should look to see if the case before it is one in which comity still has a role to play.

A 28, 938 F.2d at 932.

The opinion then conducted an evaluation of the *Timberlane* factors and, as to the "degree of conflict with foreign law or policy," determined:

> The district court found that application of the antitrust laws to the London reinsurance market "would lead to significant conflict with English law and policy. . . ." The British [*amicus curiae*] brief reiterates that conclusion; we do not doubt its accuracy. Such a conflict, unless outweighed by other factors, would by itself be reason to decline exercise of jurisdiction. *Timberlane Lumber Co. v. Bank of America*, 749 F.2d 1378, 1384 (9th Cir. 1984) (*Timberlane II*), *cert. denied*, 472 U.S. 1032 (1985).

A 29, 938 F.2d at 933.

However, after evaluating five of the six other factors of the *Timberlane* test, the panel concluded that the only consideration pointing toward abstention was the conflict with British policy and that this was insufficient to overcome "the weight of the findings already made under the Foreign Trade Antitrust Improvements Act." [11] A 31, 938 F.2d at 934.

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[11] Without explanation, the panel did not consider the seventh *Timberlane I* factor, *i.e.*, "the relative importance to the violations charged of conduct within the United States as compared with conduct abroad." 549 F.2d at 614. This factor favors non-assertion of U.S. jurisdiction. *See* text *infra* at 26.

SUMMARY OF ARGUMENT

This case raises important questions relating to mutual respect between close allies and deference to principles of international law and comity. The decision of the court of appeals ignores those principles and the weight which this Court has attached to them in numerous opinions. The British Government urges the Court to reverse the decision below. It asks the Court to rule that, consistent with the demands of international law and comity, the U.S. courts should not exercise subject matter jurisdiction over those antitrust claims in this case which are directed against business activity being conducted in London by the British insurance and reinsurance industry for a legitimate business purpose in a manner consistent with the British Government's regulatory and competition regime.

Companies carrying on insurance business in the United Kingdom must be authorized by and operate under the supervision of the Department of Trade and Industry. The conduct of insurance business in the United Kingdom is also subject to U.K. and European Community ("E.C.") competition laws. A conflict arises in this case because Respondents ask the U.S. courts to impose substantial liability and restrictions on the British industry which is operating under the British regulatory and competition regime.

Dismissal of the Respondents' claims is required as a matter of both international and U.S. law. The FTAIA should not be construed as reflecting an intention by the Congress indiscriminately to apply U.S. antitrust law extraterritorially against business conduct engaged in by foreign nationals entirely outside of the United States for a legitimate business purpose. This Court has long held that federal statutes should not be construed to violate international law if any other possible construction remains, and the Court has also recently

reiterated the principle that legislation of Congress, unless a contrary intention appears, is meant to apply only within the territorial jurisdiction of the U.S. Moreover, even assuming that the FTAIA technically confers jurisdiction on the U.S. courts in a case like the present one, the court of appeals erred in that it did not hold that, because of considerations of international comity, such extraterritorial jurisdiction should not be exercised.

ARGUMENT

I. THE DECISION OF THE COURT BELOW DISREGARDS THE BRITISH GOVERNMENT'S REGULATION OF THE LONDON REINSURANCE MARKET AND AUTHORIZES AN EXERCISE OF U.S. JURISDICTION THAT SEVERELY CONFLICTS WITH BRITISH LAW AND POLICY

As both of the courts below recognized, the London reinsurance and retrocessional insurance businesses are carried on in a framework established by the British Government. Indeed, the United Kingdom has a long-standing, sophisticated system of insurance regulation. The degree and level of insurance and competition regulation in the United Kingdom have, of course, been the result of carefully assessed policy considerations over the years. The relevant legislation contains extensive provisions regulating the carrying on of the insurance business. In particular, the Insurance Companies Act, 1982,[12] requires that, with certain exceptions, all companies wishing to carry on insurance business in the United Kingdom must be authorized by the Department of Trade and Industry and are subject to continued supervision by that Department. Companies must have adequate initial capital and be managed by fit and proper persons. All authorized insurance companies are required to make regular financial filings to the Department of Trade and Industry. It is recognized in the legislation that the requirement of a minimum solvency margin cannot by itself secure the financial stability of any insurer and that it is incumbent on the insurer itself to adopt a prudent approach to its underwriting, notably by ensuring that it does not take on unreasonable or unpredictable risks. However, the legislation confers upon the Department wide powers of intervention where it appears that any activities undertaken by an insurer would prejudice the interests of its policyholders. The filings with the Department of Trade and Industry must show that the companies meet the minimum margin of solvency as laid down in the E.C. Life and Non-Life Insurance Establishment Directives and that they have reserves adequate to cover their expected liabilities. Although those E.C. Directives only cover direct insurance, the U.K. has applied them to reinsurance under the Insurance Companies Act, 1982.

[12] 1982, ch. 50 (Eng.).

That Act also contains provisions relating to the conduct of insurance business by members of the Society of Lloyd's, the detailed regulation of which is governed by the Lloyd's Acts, 1871-1982,[13] and the bylaws enacted by the Council of Lloyd's pursuant to authority delegated to it by those Acts. The governing principle of the British Government's regulation of Lloyd's is that of self-regulation within the Lloyd's market, subject, of course, to the general laws as set out above. As with the companies, Lloyd's members and syndicates are required to meet solvency standards and to file evidence of their compliance with those standards with the Department of Trade and Industry. If these requirements are not met, then the members must cease underwriting.

The conduct of insurance business is subject to investigation under U.K. competition laws. It may be investigated under the Fair Trading Act, 1973,[14] and the

[13] 1982, ch. 14 (Eng.).

[14] 1973, ch. 41 (Eng.).

Competition Act, 1980.[15] These laws provide for the reference and investigation of practices following which, if there are findings adverse to the public interest, the Secretary of State has powers to make remedial orders.[16] In appropriate circumstances, European Community competition law may also be applicable, such as Article 85 of the Treaty of Rome relating to agreements and concerted practices restricting or distorting competition within the common market.[17] The E.C. Merger Control Regulation may also be applicable.[18] Mergers of insurance companies are subject to the merger control rules in the Fair Trading Act. In addition, any change of control of an authorized insurance company requires the approval of the Secretary of State under the Insurance Companies Act, 1982.

As does the United States, the United Kingdom has certain competition law exemptions for insurance. The district court referred to the exemption from the Restrictive Trade Practices Act, 1976,[19] given to certain (but not all) agreements relating to insurance services by the Restrictive Trade Practices (Services) Order 1976.[20] A 73, 723 F. Supp. at 488. Moreover, the U.K. authorities keep their competition policies under review. The Conservative Party included in its last election manifesto a commitment to "tackle all anticompetitive and restrictive

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[15] 1980, ch. 21 (Eng.).

[16] Under the Competition Act there is also the possibility of the Director General of Fair Trading obtaining remedial undertakings from the companies concerned. Under the Fair Trading Act such undertakings may be given to the Minister.

[17] Treaty of Rome, 1957, art. 85, 298 U.N.T.S. 11.

[18] Council Regulation (EEC) 4064/89, 1989 O.J. (L 395) 1.

[19] 1976, ch. 34 (Eng.). The 1976 Act consolidated earlier enactments relating to restrictive trade practices.

[20] S.I. 1976, No. 98.

practices with vigour. We will introduce new legislation giving stronger powers to deal with cartels."[21]

Given this framework and the British Government's obvious legitimate interest in the stability and reliability of the insurance and reinsurance market in its territory, the conflict in this case arises because Respondents ask the U.S. courts to place restrictions on the British industry which is operating under the British regulatory and competition regime and also to subject British nationals to substantial legal liability for conduct in London which the district court properly found was "conducted in conformity with English law . . . [for] a legitimate business purpose." A 73, 76, 723 F. Supp. at 488, 490. The court of appeals itself accepted the district court's finding that the conduct had a "legitimate business purpose" and noted the existence of the conflict. A 29, 938 F.2d at 933-34.

The British scheme of regulation, including its competition policy aspects, has its origins in the history of the British insurance industry and of British competition policy, and the way in which the British Parliament has thought fit to legislate on both aspects over the years. It is for authorities responsible for the law in the United Kingdom, in the light of developments, *e.g.*, in the U.K. insurance industry, to decide whether to change the system. Some changes flow from British membership in the European Community. That is quite different from the order of a U.S. court applying extraterritorially U.S. legislation in whose formulation the British Government played no part, and to whose jurisdiction it has not assented. It would be inappropriate for the U.S. courts to take such action.

The U.S. Government has chosen a regulatory regime for the insurance business that involves substantial con-

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[21] The British Government published a White Paper in July 1989, *Opening Markets: New Policy on Restrictive Trade Practices*.

trol by state governments and an exemption from the federal antitrust laws. An assertion by an English court of a right to substitute its own regulatory structure in relation to portions of the U.S. regime on the basis of concepts of English law surely would be deemed by U.S. courts to be unreasonable and to create a conflict with U.S. law and policy. It is no wonder, therefore, that the assertion of jurisdiction by the U.S. courts here is viewed by the British Government as constituting an offensive interference with its sovereign rights and significant interests.

II. DISMISSAL OF THE SUBJECT CLAIMS IS REQUIRED BY INTERNATIONAL AND U.S. LAW

It is well established that rules of international law are part of the law of the United States, and that U.S. courts are bound to give effect to international law. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Restatement (Third) of the Foreign Relations Law of the United States* § 111 (1987) [hereinafter cited as "*Restatement (Third)*"]; Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1561-67 (1984). International law limits the authority of nations to assert jurisdiction over matters affecting the interests of other nations.

> The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations. . . . The principal corollaries of the sovereignty and equality of states are: (1) a jurisdiction, prima facie exclusive, over a territory . . .; (2) a duty in non-intervention in the area of exclusive jurisdiction of other states . . . .

Ian Brownlie, *Principles of Public International Law* 287 (4th ed. 1990).

In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) this Court stated that "the concept of territorial sovereignty is so deep seated, [that] any state may

resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders."

The fact that a nation has personal jurisdiction over a foreign entity by reason of that entity's business contacts is insufficient to give that nation general jurisdiction over all of the activities of the entity anywhere in the world. This is particularly the case when the extraterritorial exercise of jurisdiction would be inconsistent with the law of the nation where the foreign entity is a citizen and the challenged activity occurred.

Under international law and the principles of moderation and restraint as they have been applied in U.S. courts, the extraterritorial exercise of a U.S. court's jurisdiction to prescribe or to enforce must always be reasonable. A state "may not exercise jurisdiction" when to do so would be unreasonable, after evaluating and balancing all of the relevant factors. *Restatement (Third)* §§ 403, 431.

In recognition of the well established principles in this regard, the U.S. and U.K. Governments, as well as other Member States of the Organization for Economic Cooperation and Development ("OECD"), have agreed to avoid or minimize conflicts with foreign laws, policies or interests by following an approach of "moderation and restraint, respecting and accommodating the interests of other Member Countries." OECD, *Minimizing Conflicting Requirements: Approaches of "Moderation and Restraint"* 7 (1987). Moreover, in its recent executive agreement with the Commission of the European Communities[22] the Executive Branch of the U.S. Government agreed that the important interests of the other Party "would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities."[23] Both lower courts

[22] Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, 1991, 30 I.L.M. 1491.

[23] *Id.* at Art. VI(1).

have agreed that such antecedent British Government laws and policy statements exist in this case.

A. Congress Did Not Express an Intention that the FTAIA Should Apply to Conduct by Foreign Nationals in Their Home Nation Which Was for a Legitimate Business Purpose and Consistent with the Law of that Nation

The three counts of the complaints at issue here challenge conduct in the United Kingdom by British firms. The question before the Court is whether the Sherman Act, as amended by the FTAIA, applies extraterritorially in the extreme circumstances of business conduct engaged in by foreign nationals entirely outside the United States, which conduct was consistent with the laws of their home nation, a close ally of the United States, which strongly objects to the exercise of such extraterritorial jurisdiction.

The British Government urges that such an application of the FTAIA would be inconsistent with international law and comity. It further submits that this application could not have been intended by the Congress in enacting the law.

This Court has long held that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), *Restatement (Third)* § 114.[24] In *Equal Employment Opportunity Commission v. Arabian American Oil*

[24] A Comment to § 115 of the *Restatement (Third)* explains:

> It is generally assumed that Congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law. . . . The courts do not favor a repudiation of an international obligation by implication and require clear indication that Congress, in enacting legislation, intended to supersede the . . . international obligation.

Id., comment a, at 64.

Company, 111 S. Ct. 1227 (1991) ("*ARAMCO*"), this Court reiterated that it is a longstanding principle of American law that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." 111 S. Ct. at 1230, *quoting Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

Among the underlying reasons cited by this Court for this long-standing principle of statutory construction was that "it serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." 111 S. Ct. at 1230. In order to avoid such discord with foreign nations, this Court stated that "we assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is "the affirmative intention of the Congress clearly expressed," we must presume it "is primarily concerned with domestic conditions." *Id.* at 1230, *quoting Benz v. Companie Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) and *Foley Bros., supra*, 336 U.S. at 285. This Court also stated in *ARAMCO* that:

> [W]e have repeatedly held that even statutes that contain broad language in their definitions of "commerce" that expressly refer to "*foreign commerce*," do not apply abroad.

111 S. Ct. at 1232.

Indeed, in a recent speech examining this Court's *ARAMCO* decision and the FTAIA itself, the General Counsel of the U.S. Federal Trade Commission stated that:

> [I]t is not clear that the jurisdictional reach of the statute [FTAIA] extends to foreign conduct undertaken by foreign nationals.

Examined in the light of the *ARAMCO* presumption, it would not appear that either the FTAIA or

> the Sherman Act provides the necessary "plain statement" of Congressional intent to support its extraterritorial construction. . . . While the definition of "commerce" under both the Sherman and Federal Trade Commission Act makes specific reference to *foreign* commerce, the jurisdictional language of both statutes is indistinguishable from the sort of "boilerplate" that the Court deemed unpersuasive in *ARAMCO*, and falls short of the kind of language that the Court deemed persuasive under the Lanham Trade-Mark Act.

James M. Spears, General Counsel. Federal Trade Commission, Address Before the International Law Section of the Canadian Bar Association (September 15, 1992).

The legislative history of the FTAIA makes it clear that the purpose of the Congress was to amend the Sherman Act to promote U.S. exports by replacing inconsistent U.S. court opinions with a single, uniform standard of U.S. antitrust jurisdiction over the activities of U.S. exporters. The co-author of the legislation, Representative McClory, stated that the bill

> squarely addresses the complaint voiced by American exporters and potential exporters that their actions are inhibited by uncertainty regarding the scope and effect of our antitrust laws. . . . By clarifying the law, it will especially help those small and medium-sized businesses which many are convinced have the greatest potential for making a significant contribution to the volume of our export trade.

127 Cong. Rec. H779 (daily ed. March 4, 1981). Congressman Rodino, the co-author of the bill who was the Chairman of the House Committee that reported the bill, stated:

> This bill will establish that restraints on export trade only violate the Sherman Act if they have a direct and substantial effect on commerce within the United States or a domestic firm competing for foreign trade.

Id.

The FTAIA was thus intended to establish that the U.S. antitrust laws should be given relatively narrow scope in their application to the export activities of U.S. firms. The Congress cannot be deemed to have been endorsing the extraterritorial application of the U.S. antitrust laws to conduct by foreign nationals in their own country which is consistent with that country's laws.

This Court has itself never suggested that the scope of the U.S. antitrust laws should be so sweeping or insensitive to the concerns of friendly foreign governments. The last time this Court ruled directly on the issue of the extraterritorial application of the Sherman Act was in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). That case involved allegations, *inter alia*, that plaintiffs had been excluded from the Canadian market by a wholly-owned Canadian subsidiary of one of the U.S. defendants. The Canadian subsidiary acted as the exclusive purchasing agent of the Canadian Government but was allegedly operated under the control and direction of its U.S. parent, for the purpose of carrying out an overall conspiracy to monopolize the relevant industry in the United States. Defendants argued that *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), shielded them from liability, because the Court held in that case that the Sherman Act did not apply extraterritorially. In *American Banana* the Court said:

> [T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notion rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other State concerned justly might resent.

213 U.S. at 357 (citations omitted).

In *Continental Ore* this Court distinguished *American Banana* on the ground that

> A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.

370 U.S. at 704.

On several occasions this Court has held that U.S. and foreign corporations engaged in anticompetitive behavior partly outside and partly inside the United States are subject to jurisdiction under the Sherman Act when the challenged behavior causes an anticompetitive effect in the United States, *see, e.g., Zenith Radio Corp. v. Hazeltine*, 395 U.S. 100 (1969), and that American businesses are not free to participate in anticompetitive activity outside the United States if their conduct causes an anticompetitive effect in the United States, *see, e.g., Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951). However, a leading treatise on this topic points out that "all foreign commerce cases since [*American*] *Banana* have included allegations of some acts within the territorial jurisdiction of the United States." 1 James R. Atwood & Kingman Brewster, *Antitrust and American Business Abroad* 70 (2d ed. 1981).

Nothing in any of these cases suggests that the assertion of extraterritorial jurisdiction is appropriate where foreign citizens have engaged in activity entirely outside the United States for a legitimate business purpose in a manner consistent with the laws of their own country. In its most recent relevant pronouncement, made after enactment of the FTAIA, this Court emphasized that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582

(1986).[25] In sum, this Court has never held, and there is no clearly expressed Congressional intention in the FTAIA to support the contention, that the Sherman Act applies to conduct entirely outside the United States, engaged in by foreign nationals for a legitimate business purpose and consistently with the laws of a close ally that strongly objects to the assertion of U.S. jurisdiction. Such a holding by this Court now would be inconsistent with its *ARAMCO* decision and international law and would lead to the type of "international discord" the Court has sought to avoid.

We also note that the European Court of Justice has declined to hold that merely having an effect within the European Community is a sufficient ground to assert jurisdiction. Case 89/85, *A. Ahlstrom Osakeyhtio v. Commission*, 1988 E.C.R. 5193, 4 C.M.L.R. 901-44 (1988) ("*Wood Pulp*"). In February 1990, the Vice President of the Commission of the European Communities, who is in charge of competition issues, stated:

> The learned Advocate General in the *Wood Pulp* case, Mr. Darmon, developed at length the qualifications to be attached to the notion of effects. . . . The Court did not consider the qualifications and it is in my view unreasonable to assume unqualified espousal of a doctrine in a judgment which does not mention it by name while those who urged its adoption accepted that it should be qualified. So the Court of Justice did not endorse the effects doctrine. . . .

Sir Leon Brittan, Jurisdictional Issues in EEC Competition Law, Address at the Cambridge University Hersch Lauterpacht Memorial Lectures (Feb. 8, 1990).

[25] In a footnote, *quoting Continental Ore*, the Court said "[t]he Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce." 475 U.S. at 582 n.6.

B. The Court of Appeals Erred in Its International Comity Analysis

Even assuming that the "direct, substantial and reasonably foreseeable" effect standard of the FTAIA technically confers jurisdiction in the extreme case presented here, the court of appeals' refusal to abstain from taking jurisdiction, on the basis of international comity, was unjustified.

This Court has stressed in several contexts the need for adherence by the U.S. authorities and courts to the basic standards of international comity. *See, e.g., Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 535 (1987) ("the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation"); *Doe v. United States*, 487 U.S. 201, 218, n.16 (1988) ("we are not unaware of the international comity questions implicated by the Government's attempts to overcome protections afforded by the laws of another nation"); and *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 115 (1987) ("a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case" is required).

The British Government notes this Court's insistence that, where comity concerns are raised, the U.S. court should undertake a careful, particularized analysis of the relevant facts of the case in order to determine the reasonableness of the assertion of jurisdiction. It may well be that no single list of factors to be considered will be appropriate in every case. In any event, it is a matter for this Court to decide whether to give guidance to lower courts in the form of a non-exclusive list of factors to be included in an analysis of international comity requirements, such as the list of factors in *Timberlane* or the list suggested by Section 403 of the *Restatement (Third)*, or whether the existing general admonition to conduct a careful, particularized analysis is sufficient.

In this case, the court below failed to heed the admonition and indeed misapplied the balancing test that it had itself previously crafted in *Timberlane* and other cases. Moreover, the court of appeals' statement that "it is only in an unusual case that comity will require abstention from the exercise of jurisdiction," misconstrued the FTAIA. Such a reading of the FTAIA is unsupported and is contrary to the statute's legislative history quoted in part by the court of appeals, A 28, 938 F.2d at 932, which expressly preserved the full vitality of the *Timberlane* principle that international comity be considered:

> If a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts' ability to employ notions of comity. *See, e.g., Timberlane Lumber Co. v. Bank of America*, 549 F.2d 1287 (3d Dis. [sic: 9th Cir.] 1979 [sic: 1976]), or otherwise take account of the international character of the transactions.

H.R. Rep. No. 686, 97th Cong., 2d Sess. at 13 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 2431, 2498.

In the FTAIA, without discussing the issues of foreign nationality and foreign government objections, Congress defined the degree of effect on U.S. commerce that is sufficient to permit a court to assert jurisdiction as one which is "direct, substantial and reasonably foreseeable." If the plaintiff fails to meet its burden of proving that the challenged conduct has such a requisite effect on U.S. commerce, the complaint must be dismissed. On the other hand, as the above-quoted legislative history clearly demonstrates, even where the requisite effect does exist, the Congress intended that the court be able to take account of the international aspects of the case consistent with the demands of international law and comity.

Under *Timberlane*, the existence of a conflict with foreign law or policy was given preeminence as a means of avoiding intrusion into the internal affairs of another

sovereign. Under the court of appeals' reformulation of *Timberlane*, however, it is unlikely that an acknowledged conflict could ever lead to judicial deference under the comity doctrine. By impairing the *Timberlane* balancing of interests test, the court of appeals' approach signals a retreat to the earlier rule of unilateral U.S. extraterritorial action which disregarded the interests of friendly foreign sovereigns.

The teaching of this Court in cases such as *ARAMCO*, *Aérospatiale*, *Doe*, and *Asahi*, that the U.S. courts must demonstrate special sensitivity to the legitimate and important interests of foreign nations, was ignored by the court of appeals. That court plainly gave inadequate weight to its own finding that the exercise of jurisdiction here would conflict with British law and policy.

Respondents have argued that there is no conflict between British and U.S. law because the British defendants do not assert that their challenged conduct was *required* by English law. That argument is erroneous because it attempts to impose the standards of the defense of foreign sovereign compulsion on the analysis of the international comity issue. If the British defendants could establish that their challenged conduct was compelled by the British Government, they would be entitled to dismissal on the basis of the defense of foreign sovereign compulsion long recognized by this Court, without any analysis of international comity. *Continental Ore*, *supra*, 370 U.S. at 706-07; *Société Internationale v. Rogers*, 357 U.S. 197, 211 (1958).[26]

[26] For such a dismissal by a lower court *see Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970).

This Court, lower U.S. courts, antitrust enforcers and commentators have offered several well reasoned explanations for the existence and importance of the foreign sovereign compulsion defense that are independent of the requirements of international comity, including: fairness to private parties caught between conflicting sovereign commands; the construction of the Sherman Act; judicial noninterference in the Executive Branch's conduct of international relations; and the concept that conduct compelled by a foreign sovereign should be deemed an act of the sovereign itself. *See, e.g.*, *Restatement (Third)* § 441; Antitrust Division, U.S. Dep't of Justice, *Antitrust Enforcement Guidelines for International Operations* 33-34 (1988).

Timberlane I, *supra*, recognized that, even when the challenged conduct is not compelled by a foreign sovereign, international comity requires an analysis of the degree of conflict with foreign law or policy. 549 F.2d at 606-08, 614. *Timberlane II*, *supra*, mandates an inquiry into "whether the extraterritorial enforcement of United States antitrust laws creates an actual or potential conflict with the laws and policies of other countries." 749 F.2d at 1384.

The fallacy of Respondents' contention here is proven by the fact that, in *Timberlane II*, although the challenged conduct was not compelled by the Honduran Government, the court held that there was a significant conflict between U.S. antitrust law and Honduran law, and that "[t]his conflict, unless outweighed by other factors in the comity analysis, is itself a sufficient reason to decline the exercise of jurisdiction over this dispute." *Id.*

The court of appeals further erred in holding that the second *Timberlane* factor, *i.e.*, "The nationality or allegiance of the Parties. . . . ," pointed towards the exercise of jurisdiction because "the interests of Britain are at least diminished where the parties are subsidiaries of American corporations." A 29, 938 F.2d at 933. This holding is contrary to well established principles of international and U.S. law which provide that, regardless of its ownership, a corporation is a national of the country under the laws of which it is organized. *See, e.g.*, *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 n.11 (1982); *Barcelona Traction (Belgium v. Spain)*, [1970] I.C.J. 3; *Restatement (Third)* § 213. Unlike *Continental Ore*, *supra*, the U.S. parent companies are not named in the complaints here and the

complaints do not allege that those parents were involved in the challenged conduct. Moreover, certain of the British defendants, and all Petitioners here, have no American parents, subsidiaries or affiliates.

Finally, the court of appeals also erred by not considering the seventh *Timberlane* factor, *i.e.*, "the relative importance to the violations charged of conduct within the United States, as compared with conduct abroad." 549 F.2d 614. The district court held that, as to two of the three claims at issue here (the Sixth and Eighth), no challenged conduct was alleged to have occurred within the United States. It also held that the alleged conduct in the United States relating to the remaining claim relevant here (the Fifth) was incidental to alleged agreements in London among the defendants. A 77, 723 F. Supp. at 490. The unexplained failure of the court of appeals to consider the seventh *Timberlane* factor obviously negates its holding that only the conceded conflict with British law weighed in favor of abstention from exercising jurisdiction.

In sum, in the view of the British Government, it is important for this and future cases that the decision of the court below, unjustifiably extending the extraterritorial reach of the U.S. antitrust laws, should be reversed.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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Nos. 91-1111 and 91-1128

In the Supreme Court of the United States
October Term, 1992

HARTFORD FIRE INSURANCE CO., ET AL.,
AND
MERRETT UNDERWRITING AGENCY
MANAGEMENT LIMITED, ET AL.,
Petitioners,

v.

STATE OF CALIFORNIA, ET AL.,
Respondents.

On Writ of Certiorari To The United States
Court of Appeals For The Ninth Circuit

BRIEF OF 19 STATES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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Nos. 91-1111 and 91-1128

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AND
MERRETT UNDERWRITING AGENCY
MANAGEMENT LIMITED, ET AL.,
Petitioners,

v.

STATE OF CALIFORNIA, ET AL.,
Respondents.

BRIEF OF 19 STATES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

The States of Delaware, Florida,[1] Hawaii, Idaho, Iowa, Kentucky, Mississippi, Missouri, New Mexico, Nevada, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont and Virginia (hereinafter "Amici States") submit this brief in support of the nineteen Respondent States. The Amici States respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit in *In re Insurance Antitrust Litigation*[2] be affirmed.

INTEREST OF THE AMICI STATES

State attorneys general are under a mandate to enforce federal and state antitrust laws. The Amici States, therefore, have a substantial interest in ensuring that federal court

[1]The State of Florida is the Plaintiff in a similar lawsuit, *State of Florida v. Hartford Fire Ins. Co., et al.*, No. C-91-3819 CAL, N.D. Cal., currently stayed pending resolution of this case.

[2]*In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991).

application of antitrust laws is consistent with underlying congressional intent, this Court's past decisions, and sound public policy. Further, state governments have a vital interest in maintaining the integrity of their insurance regulatory programs.

The Amici States support the contention of the Respondent States that the McCarran-Ferguson Act[3] ("the McCarran Act") does not immunize the conduct and agreements at issue here.[4] Antitrust laws support and supplement state insurance regulation, serving as a deterrent to private anticompetitive conduct that occurs outside the state regulatory scheme and beyond the exemption granted by the McCarran-Ferguson Act. Application of the antitrust laws to insurance activities that are either unregulated or constitute boycotts, coercion, or intimidation does not conflict with state regulatory oversight of the business of insurance.[5] Petitioners' expansive view of the McCarran exemption invites a system of private regulation within the insurance industry where anticompetitive agreements made outside the state regulatory arena, as well as coercive enforcement activity related thereto, would be free from both antitrust and state regulatory scrutiny. State insurance regulators never reviewed the underlying anticompetitive agreements and conduct at issue, and it is inaccurate to portray

[3]15 U.S.C. §§ 1011-1015.

[4]This Amici Brief addresses the McCarran-Ferguson Act questions at issue, including important public policy concerns inherent in the circuit court's decision. Although not addressed in this brief, the Amici States also support Respondents' contention that principles of international comity do not operate to deprive the federal courts of jurisdiction in this case, or counsel for abstention by the federal courts.

[5]As this Court recently stated

> Continued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls.

FTC v. Ticor Title Ins. Co., 112 S. Ct. 2169, 2176 (1992).

regulators as having approved the underlying coercive conduct involved here. Antitrust scrutiny will prevent Petitioners from circumventing state regulatory oversight by engaging in anticompetitive agreements and unregulated activity, and enforcing such agreements through boycotts and other coercion.

STATEMENT OF THE CASE

The Amici States adopt in full and incorporate by reference the Respondents' Statement of Facts. As a supplement to that statement, the Amici States provide the following background information.

Petitioners orchestrated a reinsurance boycott remarkably similar to the boycott in *United States v. South-Eastern Underwriters Ass'n ("SEUA")*, 322 U.S. 533 (1944), the case that provided the major impetus for the McCarran Act. Petitioners Hartford Fire Insurance Company, General Reinsurance, and others devised a scheme to eliminate long-tail and pollution insurance coverages from the marketplace. In early 1984, they realized that -- despite earlier efforts to achieve these goals through control of the Insurance Services Office ("ISO") drafting committees -- the new commercial general liability ("CGL") forms ISO would be filing with state regulators included long-tail and pollution coverages.[6] The conspirators knew that discontinuation of the popular long-tail and pollution insurance coverages would have to be industry-wide, or else they would lose market share to competitors who continued to offer those coverages. After the conspirators failed in the ISO forum, they brought foreign (alien) reinsurers into the

[6]The two CGL forms were the product of "the most extensive industry review of policy forms ISO has ever undertaken," according to ISO Senior Vice President Richard Savage. *Underwriter's Report*, Jan. 12, 1984. The forms were filed in March 1984 to be effective November 1, 1985; by July 1984, they were set for use in 20 jurisdictions including three (3) of the filing states: Alaska, Massachusetts and Montana. *Joint Appendix at 121-123* ("J.A."). Thus, the defendants' agreement removed reinsurance support for forms already sanctioned by some state regulators.

conspiracy. Together, the conspirators forced other insurers to capitulate by exploiting certain market dynamics: that reinsurance is essential to insurers' ability to do business; that reinsurance transactions are not regulated by the states; and that a cyclical hardening of the reinsurance market would foreseeably reduce reinsurance availability. As the market hardened through 1986[7], the conspirators exercised their leverage.[8]

Bypassing state regulation and subverting market forces of supply and demand, the conspirators usurped the prerogatives of state regulators and the marketplace choices of consumers and competitors. The manifest purpose of the agreements and associated acts of coercion was to control not just the terms on which the defendant primary insurers would deal with their own reinsurers, but also the terms on which everyone else in the market would do business. This is the same conduct this Court condemned in *United States v. South-Eastern Underwriters Association* and Congress sought to prevent by approving only a limited antitrust exemption in the McCarran Act.[9]

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[7]*See, e.g.*, Shapiro, *Insurance Market Hardening in London*, Bus. Ins., Jan. 9, 1984, at 17; Brostoff, *Adequate Pricing Seen Waiting Just Off Stage*, Nat'l Underwriter, Feb. 17, 1984, at 10; Moore, *Sharp Rise in Cost of Reinsurance Protection*, Fin. Times of London, April 24, 1984, at 27; McIntyre, *Intermediaries Anticipate Tough Renewals*, Bus. Ins., November 12, 1984, at 1; Finlayson, *EIL [pollution insurance] Capacity is Decimated by the Lack of Reinsurance*, Bus. Ins., December 24-31, 1984, at 2.

[8]In view of the explicit instances of threats and coercion mentioned in the insurance trade press between 1984 and 1986, it is likely that full merits discovery will disclose the sorts of specific enforcement acts that even Petitioners acknowledge as sufficient to state a well-pled case of boycott.

[9]On March 22, 1988, the State of Texas, under its state antitrust act, filed an action similar but not identical to that of the Respondent States: *State of Texas v. Insurance Services Office, Inc., et al.*, 1991-1 Trade Cases ¶ 69,385 (Tex. Dist. Ct., 1991). Texas conducted extensive discovery and prevailed over dispositive motions based on the McCarran-Ferguson Act and other claimed exemptions and immunities from antitrust scrutiny. On March 27, 1991, the trial court entered a consent judgment disposing of all claims against Petitioners Hartford, Aetna, CIGNA ("INA"), ISO, Merrett, Jackson, and RAA. 1991-1 Trade Cases ¶ 69,385. The consent judgment (in which the defendants specifically deny any wrongdoing) bars Petitioners Hartford, Aetna, CIGNA, Merrett, Jackson, and RAA from all ISO discussions of General Liability policy forms to be used in Texas. It also prohibits Merrett, Jackson, and RAA from attending ISO Board and committee meetings regarding policy forms or Texas-related activities. ISO also agreed to provide statistical support for all reasonably comparable non-ISO General Liability forms and superseded ISO General Liability forms. *Id.*

SUMMARY OF ARGUMENT

The Amici States ask this Court to affirm the decision of the court of appeals for the following reasons:

1. Petitioners' conspiratorial agreements and acts are not exempt from antitrust scrutiny because the conduct does not fall within the intended scope of the McCarran exemption. The purpose of the McCarran-Ferguson Act was to preserve state regulation of the business of insurance, not to permit private agreements in restraint of trade. The McCarran-Ferguson Act was designed to redress precisely the situation presented here: (1) agreements among competitors and their suppliers regarding forms of coverage and availability of insurance made outside the context of state regulation; and (2) boycotts, coercion, and intimidation used to enforce those anticompetitive agreements.

2. The court of appeals was correct in holding that Petitioners engaged in boycotts, coercion, and intimidation, which are not exempt activities under the McCarran Act. As alleged in the complaints, Petitioners dictated the terms of trade to unwilling competitors. Along with other methods of pressuring competitors, conditional refusals to deal are classic Sherman Act boycotts, and therefore boycotts under the McCarran Act. The legislative history of Section 3(b) shows that Congress intended to outlaw the use of force by groups of insurance companies to compel competitors to adhere to cartel demands.

3. The court of appeals was also correct in holding that Petitioners had not demonstrated that they were entitled in the first instance to immunity under the McCarran-Ferguson Act. The restrictive agreements between the Petitioner primary insurers and foreign reinsurers were discussed, negotiated, and consummated outside state regulatory scrutiny and supervision. Restrictive agreements falling outside the realm of state-regulated cooperative action are not protected from antitrust scrutiny by the McCarran Act.

ARGUMENT

I. PETITIONERS' CONSPIRATORIAL AGREEMENTS AND ACTS ARE NOT IMMUNIZED BECAUSE THE CONDUCT DOES NOT FALL WITHIN THE INTENDED SCOPE OF THE McCARRAN-FERGUSON ACT EXEMPTION.

The McCarran-Ferguson Act[10] has two critical purposes: (1) to affirm the continued regulation and taxation by the states of the business of insurance by granting a limited federal antitrust exemption; and (2) to ensure the continued application of the antitrust laws to the insurance industry for all conduct falling outside the scope of the limited exemption. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 217-220 (1979). The exemption is limited to activities that are both the "business of insurance" and "regulated by state law." Section 3(b) imposes a further limitation on the scope of the exemption: it provides that any agreement or act of boycott, coercion, or intimidation remains subject to the federal antitrust laws. *Royal Drug*, 440 U.S. at 219.

Through the McCarran Act, Congress sought not only to preserve state regulatory authority over the business of insurance, but also to prohibit attempts by private combinations

[10]15 U.S.C. §§ 1011-1015.

and groups to control the industry.[11] *Id.* at 219-220. Certain concerted activities within the business of insurance are not protected under the McCarran Act from antitrust scrutiny, and can be divided into two distinct categories:

(1) restrictive agreements falling outside the realm of state-regulated cooperative action, 15 U.S.C. § 1012(b) (hereinafter Section 2(b)); and

(2) "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation," 15 U.S.C. § 1013(b) (hereinafter Section 3(b)).

The conduct challenged by Respondents falls into these two categories of non-exempt activity and is, therefore, subject to the antitrust laws.

II. THE COMPLAINTS, WHICH ALLEGE THAT A GROUP OF INSURERS AND REINSURERS FORCED COMPETITORS TO ACCEDE TO PARTICULAR TERMS OF TRADE, ESTABLISH A McCARRAN ACT BOYCOTT.

[11]The legislative history of the McCarran Act plainly shows that Congress did not intend to confer immunity on any unregulated conduct. The business of insurance was to be subject either to the federal antitrust laws or to state regulation and supervision: there were to be no loopholes for private restraints. *See* 91 Cong. Rec. 1485 (1945) (remarks of Sen. O'Mahoney); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 547-551 (1978). The policy underlying the limited McCarran antitrust exemption was described by Congressman Celler during the congressional debates:

> The wise procedure would be to bring in some constructive measure that would insure the integrity of State control but at the same time permit the Federal Government to ferret out wrongful and evil interstate combinations, monopolies and bad practices.

90 Cong. Rec. 6560 (1944).

A. Section 3(b) of the McCarran-Ferguson Act subjects to antitrust scrutiny any attempts by private combinations and groups to control the insurance marketplace through private enforcement agreements and acts.

In Section 3(b), Congress sought to guarantee continued antitrust scrutiny of private enforcement agreements:

> [A]ny attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited by this [boycott] provision.

91 Cong. Rec. 1480 (1945) (remarks of Sen. O'Mahoney), J.A. at 221-222. Congress intended the boycott exception to provide "an important safeguard against the danger that insurance companies might take advantage of purely permissive state legislation to establish monopolies and enter into restrictive agreements falling outside the realm of state-supervised cooperative action." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 547 (1978). This safeguard is built into the structure of the McCarran Act itself:

> § 3(b) is an exception to § 2(b), and . . . Congress intended in the boycott clause to carve out of the overall framework of plenary state regulation an area that would remain subject to Sherman Act scrutiny. The structure of the Act embraces this exception. Unless § 3(b) is read to limit somewhat the sweep of § 2(b), it serves no purpose whatever.

Barry, 438 U.S. at 551.

The legislation was amended twice to broaden section 3(b) to ensure that the core safeguards of the Sherman Act remained applicable to the business of insurance even when regulated by

state law. *See* 91 Cong. Rec. 479, 1086-1090, and 1486 (1945); H.R. Conf. Rep. No. 213, 79th Cong., 1st Sess. (1945) (amendment extending the boycott provision beyond the moratorium period and amendment reinstating the prohibition against agreements as well as acts of boycott, coercion, and intimidation). The overriding purpose of the McCarran-Ferguson Act is to protect both state regulatory programs and the application of the antitrust laws, not to protect insurance companies. Every combination or agreement within the insurance industry against the public interest is prohibited by the McCarran Act. 91 Cong. Rec. 1486 (1945) (remarks of Senator O'Mahoney).

B. The Section 3(b) boycott exception was designed to prohibit exactly the type of private coercive conduct engaged in by Petitioners.

1. A McCarran boycott carries the full range of meaning given Sherman Act boycotts, including cartel agreements and acts to force competitors to accept specified business terms.

Section 3(b) of the McCarran-Ferguson Act is an absolute exception to the immunity provided by Section 2(b), and subjects agreements to "boycott, coerce, or intimidate" to the federal antitrust law. *See, e.g., Barry*, 438 U.S. at 551. As stated by this Court, the language, legislative history, and structure of the McCarran-Ferguson Act give guidance in determining the scope of the boycott exception. *Id.* at 540-41. The Ninth Circuit correctly interpreted Section 3(b) in accordance with its plain meaning.

The language of Section 3(b) supports Respondents' contention that the McCarran Act "boycott, coercion, or intimidation" terms carry the full range of traditional Sherman Act meaning. Congress placed no limitation upon the scope of the words: the "boycott, coercion and intimidation" language is broad and unqualified. *Id.* at 549-50.

The McCarran Act legislative history also indicates that Congress intended traditional Sherman Act boycott prohibitions to apply:[12] "[The boycott section] provides that at no time are the prohibitions in the Sherman Act against any agreement or act of boycott, coercion, or intimidation suspended. These provisions of the Sherman Act remain in full force and effect." S. Rep. No. 20, 79th Cong., 1st Sess. 3 (1945); H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945). *See Barry*, 438 U.S. at 546-47.

Under the Sherman Act, "boycotts are not a unitary phenomenon;" therefore, no single definition of the term exists. *Barry*, 438 U.S. at 543 *quoting* P. Areeda, *Antitrust Analysis* 381 (2d ed. 1974). Sherman Act boycotts do have a common element, however: the use of concerted coercive agreements or acts as a means of eliminating rival methods of competition *or* of compelling conformance with cartel demands. *See Barry*, 438 U.S. at 541, 565. *See also, In re Workers' Compensation Ins. Antitrust Lit.*, 867 F.2d 1552, 1561 n.14 (8th Cir.), *cert. denied*, 492 U.S. 920 (1989).

Petitioners concede that the use of enforcement activity to compel adherence to cartel demands is a boycott. *Pet. Br.*[13] at 28-30. To escape liability for their unlawful activities, Petitioners attempt to redefine the enforcement activity necessary to constitute a boycott. Petitioners argue that only

[12]The McCarran boycott provision is not, however, coextensive with all prohibitions of the Sherman Act. *See Barry*, 438 U.S. at 545 n.18. Such a construction would be contrary to McCarran's purposes. By limiting the language of Section 3(b) to "boycotts, coercion, or intimidation," Congress intended to allow for "salutary combinations" which were in the public interest, provided those combinations and agreements were in the open and approved by law, while ensuring that "every effective combination or agreement to carry out a program against the public interest" would be prohibited. 91 Cong. Rec. 1486 (1945). *Barry*, 438 U.S. at 549. *See* 91 Cong. Rec. 1487 (1945) (remarks of Senators Pepper and O'Mahoney).

[13]"Petitioners' brief" or "Pet. Br." refers to Brief for Petitioners in No. 91-1111.

absolute concerted refusals to deal designed to exclude competitors or customers from the market can constitute McCarran boycotts. *Pet. Br.* at 13.

Their argument fails because the scope of activities prohibited by Section 3(b) extends to all types of classic Sherman Act boycotts. Such boycotts include partial and conditional concerted refusals to deal, i.e., refusals to deal except upon particular terms. *Barry*, 438 U.S. at 543-45.[14] Under the Sherman Act, and therefore the McCarran Act, the boycott concept encompasses enforcement activities designed to compel the target of a boycott to adopt a certain standard of trade practice. Even otherwise exempt agreements under the McCarran Act regarding rates or terms of coverage can constitute Section 3(b) boycotts where an additional enforcement element such as force, pressure or compulsion is present.[15] *Id.* at 545 n.18.

While boycotts are not a "unitary phenomenon," this Court in *Barry* suggested a workable standard for determining whether a Section 3(b) boycott exists. Simple agreements to fix rates, without more, are not boycotts. Additional factors, such as

[14]In *Barry*, this Court cited as examples of Sherman Act boycotts, cases involving conditional and partial concerted refusals to deal. *See, e.g., Fashion Originators' Guild v. FTC*, 312 U.S. 457, 465-68 (1941); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 535-36 (1944); and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Other Sherman Act cases also find partial and conditional refusals to deal to constitute classic boycotts. *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 490 U.S. 1019 (1990); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 456 (1986); and *In re Workers' Compensation Ins. Antitrust Lit.*, 867 F.2d 1552, 1561-62 (8th Cir.), *cert. denied*, 492 U.S. 920 (1989).

[15]This view that virtually all Sherman Act violations involving additional pressure, force or compulsion can constitute Section 3(b) boycotts, is directly supported by the legislative history of the McCarran Act: *See, e.g.*, 90 Cong. Rec. A4407 (1944) (National Association of Insurance Commissioners Memorandum of Explanation) ("Where any group of insurers seek [sic] to act in concert to enforce so-called advisory rates, the antitrust laws will not be inapplicable").

enforcement activity aimed at compelling adherence to terms of trade, however, do constitute boycotts. Defining Section 3(b) to encompass enforcement activities faithfully carries out congressional intent and understanding.

2. As alleged in this case, the SEUA case involved refusals to reinsure risks of competitors who did not accede to the terms dictated by a private combination; in SEUA the conditional refusals to reinsure were termed "boycotts."

The "boycott, coercion and intimidation" language in Section 3(b) originated in *United States v. South-Eastern Underwriters Ass'n* ("SEUA"), 322 U.S. 533 (1944). *SEUA* involved an insurance rate setting agreement accompanied by enforcement activities. *Id.* at 534. The enforcement activities, not the rate setting agreements, were termed "boycotts." *Id.* at 535-36. As noted in *Barry*, the conspirators in *South-Eastern Underwriters* "not only fixed rates but also, in the Court's words, 'employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from [SEUA] members on [SEUA] terms.'" *Barry*, 438 U.S. at 539 n.8 (emphasis added). One of the activities labelled as a boycott was that where "[c]ompanies not members of S.E.U.A. were cut off from the opportunity to reinsure their risks." *SEUA*, 322 U.S. at 535.

The legislative history of the McCarran Act provides numerous examples from the practices of the South-Eastern Underwriters Association and similar private board organizations that illustrate that one of the "vices in the insurance industry" Congress sought to eradicate was the boycotting of competitors who refused to do business on terms acceptable to the combinations. Congress intended to outlaw the "private agreements by which these [SEUA] rates were enforced." It was concerned with the policy of these associations of denying reinsurance to all companies who did not adopt their schedule of rates and use their standardized policy terms. While the

SEUA case was the focal point for addressing boycott activities, Congress also investigated the identical practices used by other associations throughout the industry.[16]

The boycotting practices of the board organizations[17] therefore provide useful guidance in determining the intent of Congress with respect to the Section 3(b) exception.[18] Reinsurance was a tool used by these organizations to control the market and dictate the terms of trade.[19] 89 Cong. Rec.

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[16]The rules and regulations of the private associations, including the Southeastern Underwriters Association, provided Senator O'Mahoney with a vivid example of "the sort of agreement which ought to be condemned," and exemplified the larger evil of "regulation by private combinations and groups," that required the continued application of the Sherman Act. *Barry*, 438 U.S. at 549, *citing* 91 Cong. Rec. 1483, 1486 (1945).

[17]Such organizations include the Southeastern Underwriters Association, the Insurance Executives Association, and the Pacific Coast Board of Fire Underwriters.

[18]Significantly, Petitioners ignore the legislative history relating to the definition of a Section 3(b) boycott. In the first part of their boycott argument (*Pet. Br.* at 32-35) they cite the legislative history solely for the proposition that insurance requires uniformity and cooperation, and do not substantively address the meaning of boycott. Petitioners' avoidance is even more apparent when they fail to address the legislative history in their arguments on *SEUA*, even though they admit "the boycott exception is properly construed against the background of *SEUA*." *Pet. Br.* at 35. The only legislative history cited (*Pet. Br.* at 36) reiterates the uncontested issue that "mere price-fixing" is not a boycott. Petitioners are forced to avoid numerous descriptions and examples of boycotts within the history because Respondents' alleged boycotts are closely parallel.

[19]In congressional testimony, Mr. Edward L. Williams, President of the Insurance Executives Association, explained the association's policy of refusing to reinsure nonmembers:

> We say, "Here is a certain group of 10, 25, or 200." We say between ourselves, "When you belong to us and have the same ideas we do, we will automatically reinsure you."
>
> I am cutting through the guts of the thing. We don't want to undertake to reinsure somebody that might do something different. We won't say we will reinsure anybody.

8530-31 (1943) (remarks of Representative Voorhis). The Attorney General described the use by the private combinations of denial of reinsurance to force competitors to agree to particular terms: "[t]he principal instruments utilized to compel adherence to private rate-fixing agreements are reinsurance and 'separation'. . . . [t]he heavy club used by the board companies to police their rating agreements and to obtain adherence of competitors to such agreements is reinsurance."[20] *Joint Hearing Before Subcomms. of the Committees on the Judiciary on S. 1362, et al.*, 78th Cong., 1st Sess. 48 (1943) ("*Joint Hearing*") (Statement of Hon. Francis Biddle, Attorney General of the United States). He testified that the organizations' concerted private use of economic power to force desired results constituted unlawful boycotts. *Id.* at 45-48.

Senator O'Mahoney, who played a prominent role throughout the legislative process, observed that the insurance combinations "will exclude from membership those that do not play the game the way they want it played." *Id.* at 495-496. Section 3(b) was included so that "any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited." 91 Cong. Rec. 1480 (1945) (remarks of Sen. O'Mahoney). Congress intended these exclusionary practices to remain subject to Sherman Act scrutiny.

Joint Hearing Before Subcomms. of the Committees on the Judiciary on S. 1362, et al., 78th Cong., 1st Sess. 302 (1943). Senator O'Mahoney, who had questioned Mr. Williams, later remarked that the Insurance Executives Association attempted to dictate "how the business [of insurance] should be conducted." 91 Cong. Rec. 1485 (1945).

[20]The indictment in the South-Eastern Underwriters litigation charged, in part, an agreement "to adhere to standard terms, conditions, and clauses relating to coverage of risks established by the South-Eastern Underwriters Association; [and] to withdraw reinsurance facilities from fire insurance companies not members of South-Eastern Underwriters Association (that is most important)." *Joint Hearing* at 44.

Petitioners try to distinguish *SEUA* from this case by arguing that SEUA "attempt[ed] to drive non-S.E.U.A. members from the market through an absolute refusal to deal with them on any terms." *Pet. Br.* at 36 However, in *SEUA*, a group of insurers attempted to force competitors to adhere to particular terms of trade by refusing to reinsure non-complying companies. The complaints herein allege precisely the same type of enforcement activity: Petitioners refused to reinsure companies not using the claims-made form. The conduct of SEUA and other board organizations was only exclusionary (an "absolute refusal") in the sense that the combination "successfully excluded from insurance business all together by boycott, restraints, and coercion <u>all who would not adhere to their unlawful practices</u>." H.R. Rep. No. 873, 78th Cong., 1st Sess. 16 (1943) (emphasis added). Similarly, the Petitioners in this case conspired to drive competitors from the market unless they adhered to the conspirators' terms.

In enacting the McCarran Act, Congress intended to allow states to fix rates and determine use of policy forms. The legislative history discussed above clearly shows that Congress did not intend to insulate insurance companies that, outside any state-permitted structure or procedure, agree among themselves that they shall determine the terms and types of coverage offered in the marketplace. Such private conduct is exactly the type of anticompetitive action that Congress sought to prohibit under Section 3(b). If the boycott exception does not cover the alleged conduct of petitioners in this case, then private parties are permitted to control the market without congressional sanction and without state supervision or control. Application of the antitrust laws to such conduct cannot harm state regulation; it can, however, ensure that concerted boycotts against groups of competitors would not have immunity.[21]

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[21]The factual allegations in this case closely parallel those in *Barry*:

> This is not a case where a State has decided that regulatory policy requires that certain categories of risks be allocated in a particular fashion among insurers, or where a State authorizes insurers to decline

3. Petitioners' formulation of a boycott standard conflicts with the language, policy and history of the Act. Their definition of boycott would swallow the exception, and effectively create an absolute immunity from antitrust scrutiny.

Petitioners' core argument in support of immunity is that the complaints allege nothing more than "the making or implementation of protected agreements."[22] *Pet. Br.* at 14. Petitioners combine this misstatement of and disregard for the facts with an unjustifiably restrictive reading of the Section 3(b) boycott exception to immunize their actions from state regulation and antitrust scrutiny. Under their boycott standard only absolute refusals to deal (and offers to deal only upon discriminatory terms) designed to drive competitors from the market can constitute Section 3(b) boycotts.

The standard urged by Petitioners does not survive close analysis. To reach the conclusion urged by Petitioners, this Court would have to ignore the overwhelming body of Sherman Act boycott law that establishes that enforcement agreements, including conditional refusals to deal, are McCarran boycotts. Boycotts are not unitary phenomena: conditional refusals to deal designed to compel unwilling competitors to adhere to particular terms of trade are classic boycotts.

> to insure particular risks because the continued provision of that insurance would undermine certain regulatory goals, such as the maintenance of insurer solvency. In this case, a group of insurers decided to resolve by private action the problem of escalating damages claims and verdicts by coercing the policyholders of St. Paul to accept a severe limitation of coverage essential to the provision of medical services. . . . We conclude that this conduct, as alleged in the complaint, constitutes a "boycott" under § 3(b).

Barry, 438 U.S. at 554 (footnote omitted).

[22]To arrive at this conclusion requires a misconstruction of the factual allegations, and a disregard for all reasonable inferences favorable to the plaintiffs.

Petitioners' arguments flatly contravene the legislative history and policy of the Act, which clearly establish that the use of economic power to compel capitulation to particular terms of trade are McCarran boycotts. The Court held that such uses of economic power to force competitors to agree to certain terms were boycotts, and characterized that conduct as "[t]he kind of interference with the free play of competitive forces. . . which the Sherman Act has outlawed." *SEUA*, 322 U.S. at 536. Petitioners' conduct in this case is virtually identical and is precisely the type of activity that remains subject to antitrust scrutiny under the McCarran Act.

Petitioners' characterization of the allegations misstates Respondents' case. The complaints allege activities and agreements occurring *outside* of the states' regulatory structures. Petitioners privately decided not to reinsure certain risks and agreed upon the mechanism necessary to force competitors to comply. Those private agreements and their marketplace effects closely parallel the conduct that this Court condemned as a Section 3(b) "boycott" in *Barry*. 438 U.S. at 554.

Petitioners would have this Court dismiss the allegations of unregulated agreements and enforcement mechanisms in the complaints as simply "pejorative characterizations" of their actions by Respondents. Petitioners would have this Court further condone their coercive market activities as "mere implementation" of protected activities. Such a formulation would swallow the boycott provision of the McCarran Act and frustrate the congressional intent to proscribe the coercive conduct alleged herein and condemned by this Court in *SEUA*. Under this formulation, *Barry* and *SEUA* would be of mere historical interest. The same enforcement activities condemned in those cases would be condoned as "mere implementation" in this case. Viewing the complaints as a whole, the court of appeals properly found more than a simple agreement on terms; it found enforcement activity designed to compel conformance with cartel demands. Such conduct is not exempt under the McCarran Act. In proposing an exceedingly narrow and highly artificial interpretation of Section 3(b), Petitioners are in effect

asking this Court to give them, by way of construction, what the industry was unable to get from Congress: complete immunity from the antitrust laws. We respectfully urge the Court to decline that invitation.

III. THE McCARRAN-FERGUSON ACT DOES NOT CONFER ANTITRUST IMMUNITY ON UNREGULATED PRIVATE ANTICOMPETITIVE CONDUCT.

Section 2(b) of the Act contains two separate requirements for immunity, which must be satisfied independently: (1) the practice must be the "business of insurance"; and (2) it must be regulated by state law. 15 U.S.C. § 1012(b). This section discusses the state regulation requirement for conduct that is not boycott, coercion, or intimidation. In analyzing a claim of exemption based on state regulation, the relevant inquiry is whether the antitrust challenge relates to non-regulated business of insurance activities. Any activities that are not regulated by state law fail to qualify for McCarran immunity.

A. Because there was no state regulation of the challenged conduct, it is not immune under the McCarran Act and is subject to full antitrust scrutiny.

An examination of the actual status of state regulation for McCarran purposes reveals that the specific activities of reinsurers challenged here are not regulated. The focus for McCarran purposes is on whether the activity is regulated by state law, not whether the entity is regulated.[23] Reinsurance contract terms, rates, and forms are not filed or reviewed by state regulators.[24] Moreover, states examine neither the

[23]Petitioners concede this point. *See e.g., Pet. Br.* at 17.

[24]As explained by Ms. Mindy Pollack, Assistant General Counsel of Petitioner Reinsurance Association of America ("RAA") in a 1987 seminar jointly sponsored by RAA and the Insurance Information Institute:

purchase and sale of reinsurance nor the interstate or foreign reinsurance markets. In fact, "[s]tate insurance departments do not have the ability to assess the strength of companies located in other countries; they cannot be sure of how well regulated alien reinsurers are." *Proceedings of the Reinsurance Seminar*, Cannon House Office Building, Washington, D.C., 20 (1987).

State regulatory review of ISO forms is not regulation of the foreign reinsurance conduct challenged here, nor is it a substitute for such regulation. The challenged conduct affected market conditions. State regulation of forms is not sufficient to reach market conduct. By contending that the authority of the states to review the terms and conditions of primary insurance offered in this country is sufficient to satisfy the state regulation element of the McCarran Act, Petitioners implicitly concede that activities within interstate and foreign reinsurance markets are not regulated by the states. *See Pet. Br.* at 17. As will be discussed more thoroughly in the next section, Petitioners' contention is contrary to the express language and intent of the McCarran Act.

B. The state regulation test under the McCarran Act requires that States displace competition by meaningful regulation: only actual regulation of a challenged practice is sufficient to meet Section 2(b) requirements.

1. The exemption under the Act applies only "to the extent" that the activity at issue is regulated by the state.

> Subject to only a few exceptions, state insurance departments do not approve reinsurance contracts or reinsurance rates. . .[W]e do not have the same oversight that we have in primary insurance business with regard to approval of policies and policyholder protection.

Proceedings of the Reinsurance Seminar, Cannon House Office Building, Washington, D.C. 22 (1987).

To foreclose attempts by would-be private regulators to control the insurance marketplace, Congress intended that only actual regulation of the specific conduct in question satisfy Section 2(b).

The language of the McCarran Act provides antitrust immunity only "to the extent" that the business of insurance is regulated by state law. 15 U.S.C. § 1012(b). The plain language of the McCarran Act exemption requires a determination of whether the challenged practice is regulated by the state as opposed to whether insurance is so regulated. To hold general regulation of insurance sufficient to exempt a challenged practice from the antitrust laws is to give the exemption an expansive construction. Exemptions from the antitrust laws must be narrowly construed and limited to the scope clearly intended by Congress. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982). Further, a broad reading would mean regulation of any aspect of the business of insurance would satisfy the state regulation requirement for all insurance practices, thereby defeating the purpose of the McCarran Act and frustrating the application of the antitrust laws to the insurance industry.

Congress never intended state insurance department regulation of *some* insurance company activities to displace the federal antitrust laws for *all* activities. Where no actual state regulation of insurance activity exists, Congress intended the antitrust laws to apply. An expansive interpretation of the regulation requirement is inconsistent with both the precise language of the McCarran Act and the Act's legislative history.[25] *See, e.g.*, 91 Cong. Rec. 1443-1444 (remarks of Sen.

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[25]Petitioners selectively quote from the legislative history regarding the importance of reinsurance and the need for uniformity within the business. *Pet. Br.* at 19-20. Their emphasis on the importance of reinsurance only serves to strengthen Respondents' assertion that reinsurance was an effective means of compelling adherence to cartel demands. Further, Petitioners do not and cannot cite to any legislative history which shows an intent by Congress to immunize non-regulated reinsurance transactions. *But see* 91 Cong. Rec. 1485 (1945)

McCarran, Ferguson, White, and O'Mahoney), 1481 (remarks of Sen. Pepper), and 1488 (remarks of Sen. Barkley) (1945). For example, during the debate on the Conference Report, the following exchange occurred:

> "SENATOR WHITE: . . . My view is that the State may regulate. If, however, the State goes only to the point indicated [prohibition of restraints in trade], then these [Sherman, Clayton and Federal Trade Commission Acts] Federal Statutes apply throughout the whole field beyond the scope of the State's activity."
>
> "SENATOR McCARRAN: That is a correct statement."

91 Cong. Rec. 1444 (1945) (emphasis added). Senator Ferguson, in discussing state authority to regulate and tax insurance under the McCarran Act, used the language "if the States were specifically to legislate upon a particular point" to explain the quality of state regulation necessary for immunity under the Act. 91 Cong. Rec. 1481 (1945) (emphasis added).[26] President Roosevelt's message in connection with signing the McCarran-Ferguson Act further implies that a general regulatory scheme is insufficient to satisfy Section 2(b):

(remarks of Sen. O'Mahoney); 90 Cong. Rec. 6560 (1944) (remarks of Rep. Celler); 90 Cong. Rec. 6626 (1944) (remarks of Sen. O'Mahoney) (no state supervision of reinsurance). *See also*, *Joint Hearing* at 48 (Statement of Hon. Francis Biddle) (distinguishing agreements on specific treaty terms from general agreements dictating uniformity within the marketplace); *Joint Hearing* at 404 ("A third argument is the allegation that the consummation of reinsurance requires uniform rates. Every insurance man knows that is pure bunk").

[26]In a post enactment article, Senator McCarran explained that 2(b) requires actual regulation of specific conduct: "The State law should be explicit with respect to the practice which it sought to regulate." *See* McCarran, *Federal Control of Insurance: Moratorium Under Public Law 15 Expired July 1*, 34 A.B.A.J. 539, 542 (1948).

> After the moratorium period, the Anti-Trust Laws and certain related statutes will be applicable in full force and effect to the business of insurance <u>except to the extent that the States have assumed the responsibility, and are effectively performing that responsibility, for the regulation of whatever aspect of the insurance business may be involved.</u>

Press release by President Roosevelt (Mar. 10, 1945), *reprinted in* Donovan, *Regulation of Insurance Under the McCarran Act*, 15 Law & Contemp. Prob. 473, 478 (1950) (emphasis added).[27]

Congress refused to grant a blanket antitrust exemption to the insurance industry. Indeed, the McCarran Act embodies the congressional policy that states may regulate the business of insurance, but, that absent state regulation, the business should be subject to full competition.[28] "Congress did not intend to permit private rate fixing, which the Antitrust Act forbids, but was willing to permit actual regulation of rates by affirmative action of the State." 13 *Public Papers and Addresses of Franklin D. Roosevelt*: 1944-45 587 (Rosenman, ed. 1950) (commentary of President Roosevelt on signing the McCarran Act) *quoted in Royal Drug*, 440 U.S. at 224. Section 2(b) allows the states to permit "combinations" among insurers if they are in the public interest, "provided those combinations and agreements [are] in the open and approved by law." 91 Cong. Rec. 1486 (1945) (remarks of Sen. O'Mahoney). "Public supervision of agreements is essential [to immunize the conduct]." *Id.* .

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[27]*See also* 91 Cong. Rec. 1444 (1945) (remarks of Senator White) ("[T]he force and effect of [the Sherman Act] may be applicable and shall be applicable to whatever extent the State law fails to occupy the ground and engage in regulation"); 91 Cong. Rec. 1482 (1945) (remarks of Senators Murdock and Pepper).

[28]For example, during the debate on the Conference Report, the following exchange occurred:

> SENATOR BARKLEY: I should like to ask, in this connection, whether, where States attempt to occupy the field--but do it inadequately--by going through the form of legislation so as to deprive the Clayton Act, the Sherman Act, and the other acts of their jurisdiction, is it the Senator's interpretation of the conference report that in a case of that kind, where the legislature fails adequately even to deal with the field it attempts to cover, these [antitrust] acts <u>would</u> apply?
>
> SENATOR McCARRAN: That is my interpretation.

91 Cong. Rec. 1444 (1945) (emphasis added).

This Court's decision in *FTC v. National Casualty Co.*, 357 U.S. 560 (1958), is not contrary to a finding that Section 2(b) requires actual state regulation of the particular conduct at issue. In *Nat'l Casualty*, the Federal Trade Commission ("FTC") challenged certain unfair and deceptive insurance advertising practices under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. *Id.* at 562. This Court rejected as "not persuasive in the instant cases" the FTC's argument that the state regulatory laws were not effectively applied and, therefore, did not meet Section 2(b) requirements. *Id.* at 564. This Court, in doing so, focused narrowly on the regulation of the specific conduct at issue, rather than upon the existence of a general state regulatory scheme:

> An examination of [the McCarran Act] and its legislative history establishes that the Act withdrew from the Federal Trade Commission the authority to regulate respondents' <u>advertising practices</u> in those States which are regulating <u>those practices</u> under their own laws.

id. at 562-563 (footnote omitted) (emphasis added). Therefore, in analyzing a claim of exemption under the McCarran Act, the relevant question is whether the challenged practices are regulated by state insurance laws, rather than whether a general regulatory scheme exists. *Id.*

Petitioners' view of state regulation would provide an absolute immunity for private anticompetitive behavior that does

violate Section 3(b), since all states have enacted some form of insurance regulation. Such immunization of private anticompetitive conduct flatly contravenes the plain language, congressional intent, and policy of the McCarran Act. To interpret Section 2(b) to require only a general statutory scheme would leave the Section 3(b) boycott prohibition as the sole restraint upon anticompetitive conduct. The intent behind the McCarran Act, to provide two safeguards against private regulation, would be defeated.

2. Prohibitory legislation, standing alone, does not displace antitrust scrutiny of insurance activities.

Section 2(b) states that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business." Where application of federal antitrust laws does not conflict with state insurance regulation, the Section 2(b) requirement is not met, and the business of insurance remains subject to Sherman Act scrutiny.[29] In the area of state prohibitory legislation it is clear that application of the federal antitrust laws does not conflict with state laws. *See* 91 Cong. Rec. 1444 (1945) (remarks of Senators Pepper and O'Mahoney).

Neither state antitrust acts nor state Unfair Insurance Practices Acts ("UIPAs") should be construed to trigger

[29]Petitioners' professed concern for "protecting state regulation of insurance from federal antitrust interference" (*Pet. Br.* at 47) is unwarranted. Ann Richards, Governor of Texas and Allene Evans, currently a member of the Texas Department of Insurance, testified before a United States House of Representative Subcommittee that a state's power to regulate insurance would be unaffected even if McCarran were repealed. "Let me assure you that the State's power to regulate is in no way weakened by repealing the McCarran-Ferguson antitrust exemption. In fact, it will give us additional strength." *Hearing Before the Subcommittee on Economic and Commercial law on the Committee on the Judiciary on H.R. 9*, 102nd Cong., 1st Sess. 17 (1991). In 1990, Texas amended its state antitrust act to repeal the antitrust exemption for the business of insurance. *See* Note 33.

McCarran Act antitrust immunity.[30] The McCarran Act was passed to ensure that Sherman Act prohibitions did not <u>interfere</u> with state regulatory policy.[31] In the case of state unfair practices acts, the state regulatory policy complements the Sherman Act, rather than conflicts with it. The unfair insurance practices acts passed by the states prohibit "boycott, coercion, and intimidation," just as the Sherman Act and the McCarran Act exception itself.[32] Holding state unfair practices acts sufficient to satisfy the state regulation requirement under Section 2(b) of the McCarran Act would provide antitrust immunity to the very conduct prohibited by such acts, as well as by the McCarran and Sherman Acts.

Federal antitrust laws also do not invalidate, impair, or supersede state antitrust laws -- these laws are mutually compatible and readily accommodated. State antitrust laws and UIPAs are not truly "regulatory" legislation. They do not displace competition with regulation, but rather provide rules of conduct for the competitive market. Finally, state antitrust laws are not laws "enacted by any State for the purpose of regulating the business of insurance, or which impose[s] a fee or tax upon

[30]To the extent that *Nat'l Casualty* stands for the proposition that "prohibitory legislation" displaces federal antitrust scrutiny, the legislative history of the McCarran Act discussed earlier is to the contrary.

[31]The legislative history strongly suggests that UIPAs and state antitrust laws are not the type of state regulatory control Congress originally contemplated as preempting federal antitrust scrutiny. *See Joint Hearing* at 38-41, 52-56; 89 Cong. Rec. A5385 (1943); 90 Cong. Rec. 6419 (1944); and 91 Cong. Rec. 480-81, 1444. *See also*, Weller, *To Preempt or to Accommodate: The Question of State and Federal Antitrust Laws Under the McCarran-Ferguson Act*, 9 Toledo L. Rev. 421 (1978).

[32]The Joint Committee Report presented to the NAIC with the final draft of the NAIC Model Act, emphasizes that "incorporation by any state of [the boycott provision] cannot make inapplicable [Section 3(b) of McCarran, but will] minimize the likelihood of parallel action by the federal government." NAIC Proceedings, 381, 383-84 (January, 1947). Thus, this legislation was not intended to displace the Sherman Act.

such business,"[33] and therefore do not meet the requirements of Section 2(b).

C. The legislative history of the McCarran-Ferguson Act supports the use of a state regulation test based on the state action doctrine first enunciated by this Court in Parker v. Brown.

The legislative history of the McCarran Act indicates that Congress fully intended Section 2(b) to be interpreted consistently with this Court's decision in *Parker v. Brown,*[34] 317 U.S. 341 (1943). Commentators relying on the legislative history have argued that the state regulation requirement is essentially an incorporation of the *Parker* state action doctrine. *See, e.g.,* Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy,* 1978 Duke L.J. 587, 615-19; and Anderson, *Insurance and Antitrust*

[33]Some states do not exempt the business of insurance from their antitrust laws. *See, e.g.,* Tex. Bus. & Com. Code § 15.05(g) ("An exemption otherwise available under the McCarran-Ferguson Act does not serve to exempt activities under [the Texas Free Enterprise & Antitrust Act]").

[34]While the *Parker* state action standard may be incorporated in Section 2(b) of the McCarran Act, Section 3(b) of the Act clearly limits the scope of immunity provided by state action under Section 2(b). The *Parker* Court based the exemption on the absence of congressional intent to apply the Sherman Act to state action. The legislative history of the McCarran Act, however, demonstrates that Congress intended the Sherman Act to apply to boycotts, coercion, and intimidation even when the state regulates that conduct. Therefore, the state action doctrine can never be used to immunize acts or agreements of boycott, coercion, or intimidation prohibited under Section 3(b). *See, e.g.* 91 Cong. Rec. 480-81 (1945) (remarks of Sen. Ferguson); 91 Cong. Rec. 1443 (1945) (remarks of Senators McCarran and Ferguson); 91 Cong. Rec. 1481 (1945) (remarks of Sen. Ferguson). *See also Barry,* 438 U.S. at 547-48, 551; *Ballard v. Blue Shield of Southern W. Va., Inc.,* 543 F.2d 1075, 1078-79 (4th Cir. 1976); Carlson, *The Insurance Exemption from the Antitrust Laws,* 57 Tex. L. Rev. 1127, 1147-50 (1979).

Law: The McCarran-Ferguson Act and Beyond, 25 Wm. & Mary L. Rev. 81, 101-102 (1983).[35]

Although the Court need not reach this issue to determine whether Petitioners' conduct was regulated by the States, there is considerable support in McCarran Act language, policy, and history for use of the *Parker* standard. The language of 2(b) -- "to the extent that such business is not regulated by state law" -- is compatible with the state action interpretation. The *Parker* decision was discussed on several occasions during the debates on the McCarran Act.[36] During the House debate, Congressman Russell of Texas cited *Parker* as authority that application of the federal antitrust laws to insurance companies would not destroy state insurance regulation:

> *Parker v. Brown* (317 U.S. 341) upheld state regulations . . . The insurance companies state that if insurance is held commerce, all state regulation will be held to be a violation of the antitrust laws, and especially in establishing rates. And in this they are as wrong as their other contentions. The Supreme Court has held against them every time the question has been presented to the Court. . . In *Parker v. Brown* (317 U.S. 341), the Supreme Court held against this contention.

[35]Extensive discussion of the *Parker* doctrine as it relates to the McCarran Act may be found in Anderson, *Insurance and Antitrust Law: The McCarran-Ferguson Act and Beyond,* 25 Wm. & Mary L. Rev. 81, 95 *et seq.* (1983); Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy,* 1978 Duke L.J. 587, 615-19; Kintner & Bauer, *Application of the Antitrust Laws to the Activities of Insurance Companies: Heavier Risks, Expanded Coverage, and Greater Liability,* 63 N.C.L. Rev. 431, 473-76 (1985); Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason,* 27 UCLA L. Rev. 265, 289 (1979); Carlson, 57 Tex. L. Rev. at 1150-61.

[36]The *Parker* state action doctrine was also discussed during the hearings. *See, e.g., Joint Hearing* at 51-54 (Statement of Hon. Francis Biddle, Attorney General of the United States); 131-32 (Statement of Hon. Wendell Berge, U.S. Assistant Attorney General).

89 Cong. Rec. 10,150 (1943) (remarks of Rep. Russell). Senator O'Mahoney, in discussing the final version of the McCarran-Ferguson legislation, expressed the view that the McCarran Act incorporated the *Parker* doctrine in its state regulation requirement:

> I take it that the Senator is apprehensive less a statute passed by a State attempting to give validity to a private agreement to regulate would be recognized under this language [§ 2(b)]. I think it would not, because on page 351 of the same case, Parker against Brown, I find this language from the Supreme Court:
>
> > True, a State does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful (*Northern Securities Co. v. United States*, 193 U.S. 197, 332, 344-347).

91 Cong. Rec. 1480 (1945), J.A. at 221. The National Association of Insurance Commissioners ("NAIC") also took the position that Section 2(b) is essentially an enunciation of the *Parker v. Brown* decision.[37] *See also* 89 Cong. Rec. 8532 (1943) (remarks of Representative Voorhis).

The *Parker* state action doctrine, like Section 2(b), addresses federalism concerns, and is premised on state regulation of challenged conduct. *Parker* immunizes state governments and private parties from antitrust scrutiny when state regulation of an activity exists.[38] Defendants exercising

[37]NAIC Memorandum of Explanation, *reprinted in* 90 Cong. Rec. A4407 (1944). *See also*, NAIC, *Monitoring Competition: A Means of Regulating the Property And Liability Insurance Business*, 27 n.58 (1974).

[38]The *Parker* standard requires that private anticompetitive conduct (1) must be clearly articulated and affirmatively expressed as state policy and (2) must be actively supervised by the state before antitrust immunity applies. *Patrick v. Burget*, 486 U.S. 94, 100 (1988).

governmental powers are not immune from antitrust scrutiny if their activity is (1) private; and (2) unsupervised. This exact policy underlies the McCarran 2(b) state regulation requirement: the business of insurance must be supervised by the states. Public supervision is essential for immunity to apply. *See* 91 Cong. Rec. 1486 (1945) (remarks of Senator O'Mahoney).

This Court's focus on a clear state intention to substitute meaningful state regulation for competition, leaving no gaps for private governments, runs through the recent treatment of the related state action doctrine. This Court recently explained the policy reason underlying *Parker*: "We referred to the purpose of preserving the State's own administrative policies, as distinct from allowing private parties to foreclose competition. . . ." *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2177 (1992) (discussing *Patrick v. Burget*, 486 U.S. 94 (1988)). In *Ticor*, this Court focused its analysis on whether there was actual regulation of the anticompetitive conduct at issue: "In the absence of active state supervision in fact, there can be no state-action immunity for what were otherwise private price fixing arrangements." 112 S. Ct. at 2179.

This policy of eliminating private control of interstate commerce, and preserving the state's own regulatory policies, is echoed in the McCarran-Ferguson Act.[39] It would seem anomalous for this Court to conclude as it did in *Ticor* that the state regulation of title insurer search and examination fees was insufficient for "active supervision" yet the lack of <u>any</u> state review <u>under the same statute</u> of the boycotts alleged in Respondents' complaints was sufficient for McCarran immunity. Whether Section 2(b) is the embodiment of *Parker* or simply analogous to it, the state regulation requirement represents a

[39]"[T]here are three forms of regulation. There is State regulation. . . . There is Federal regulation. . . .

The third, and this has been harmful to the public interest, is regulation by private combinations and groups. . . . that type of regulation would be absolutely outlawed should the conference report be adopted." 91 Cong. Rec. 1483 (1945) (remarks of Senator O'Mahoney), J.A. at 223.

Congressional policy decision to immunize only conduct that is actually subject to regulation. Interpreting Section 2(b) consistently with the *Parker* state action standard prevents unintentional grants of immunity to insurers, and ensures that state regulatory prerogatives are not usurped by private insurance cartels.

CONCLUSION AND PRAYER

The purpose of the McCarran-Ferguson Act was to permit state-authorized and supervised cooperative insurance activity, not to give insurance companies carte blanche to engage in private anticompetitive agreements and acts occurring outside state regulatory authority, or boycotts, coercion, and intimidation. In this case, a private combination directly dictated the availability of certain types of coverages in the marketplace, usurping the prerogatives of state regulators and the choice of competitors and consumers. Such conduct is outside the scope of the McCarran-Ferguson Act exemption and proscribed by the antitrust laws.

For the foregoing reasons, the Amici States respectfully request that the decision of the Ninth Circuit in the instant case be affirmed.

Respectfully submitted,

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Nos. 91-1111 and 91-1128

In The

Supreme Court of the United States

October Term, 1992

HARTFORD FIRE INSURANCE CO., *et al.*,
AND
MERRETT UNDERWRITING AGENCY
MANAGEMENT LIMITED, *et al.*,

Petitioners,

v.

STATE OF CALIFORNIA, *et al.*,

Respondents.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF AMICI CURIAE OF SERVICE INDUSTRY COUNCIL AND CALIFORNIA STATE ELECTRONICS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The *amici* are associations which represent substantial sectors of the United States economy related to the businesses of servicing and maintaining appliances, computers, consumer and business electronic products, office equipment, and all related products sold to businesses and consumers in the United States.[1] Electronics associations and others in the same business have approximately 40,000 separate establishments with approximately three employees per establishment representing approximately 120,000 jobs.

The businesses carry commercial general liability insurance as well as other forms of insurance. This insurance is mandatory for the proper functioning of their businesses. During the last number of years, the businesses have paid and continue to pay increasingly higher premiums for their commercial general liability insurance.

Individuals who are owners and employees of the businesses as well as all other consumers have also been required to pay increasingly higher premiums for their personal insurance.

These individuals and other consumers have also been required to pay higher prices for all products due to the increases in commercial general liability insurance premiums.

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[1] This Brief is filed pursuant to Rule 37.2 of the Rules of this Court, accompanied by the written consent of all parties.

A. Service Industry Council

The Service Industry Council ("SIC") is a coalition of national and state associations. These associations represent servicers for appliances, computers, consumer electronics products, home equipment, and office equipment.

B. California State Electronics Association

The California State Electronics Association ("CSEA") is a statewide trade association consisting of companies and individuals, who perform warranty and out-of-warranty service on appliances, business equipment, computers, commercial electronics products, and consumer electronics products.

SUMMARY OF ARGUMENT

The insurance business today is a massive worldwide enterprise of interlinked businesses and individuals whose decisions, wherever made, affect businesses and the lives of every person in every part of the world.

The United States insurance industry, at the end of 1991, had assets of more than $2.15 trillion. It had premiums of approximately $663.6 billion, and investment income of approximately $34.2 billion for a total income of approximately $697.8 billion ($.6978 trillion).

This is approximately 400% greater than the retail sales of new automobiles for the year 1990.

The United States insurance industry represents approximately 12% of the United States Gross Domestic

Product of approximately $5.522 trillion (1990) and approximately $5.677 trillion (1991). A comparison of the total premiums paid in 1991 to the latest reported figures of the number of businesses in the United States (6,107,413 in 1989), and the population of the United States (248,709,873 in 1990), shows that each business accounted for an average of $108,500.00, in premiums and each man, woman and child accounted for an average of $2,700.00 in premiums.

In the property/casualty category (excluding automobiles) of the United States insurance industry, the comparable figures are $601 billion in assets, approximately $223 billion in premiums, approximately $35,000.00 for each business, and approximately $900.00 for each man, woman and child.

The facts and allegations of the Complaints specifically allege boycott and coercive activity directed to the United States market and the corresponding effect on it.

During the alleged boycott years of 1984 through 1987, property/casualty insurance premiums and profits rose up to 300%.

The conduct alleged in the Complaints is beyond affirmative agreements and extends to concerted agreements and the implementation thereof to refuse to offer coverage. This conduct is within the boycott exception of the McCarran-Ferguson Act as interpreted in *Barry*, and as reflected in the legislative history. The McCarran-Ferguson Act exemption is lost under *Pireno* and *Royal Drug* when foreign reinsurers, who are not contemplated as in

the "business of insurance" under the McCarran-Ferguson Act, and who cannot be regulated by the states, combine with domestic insurers and reinsurers.

State officials could not and did not approve the alleged boycott activity, thereby precluding any McCarran-Ferguson Act exemption, even if such were available.

Extraterritorial jurisdiction is proper under the teachings of *Alcoa, Continental Ore*, and *Matsushita*. The FTAIA codified such concepts.

Comity does not preclude jurisdiction over the foreign reinsurers under the teachings of *Timberlane I, Mannington Mills*, or the Restatement (Third) of the Foreign Relations Law of the United States.

United Kingdom law and policy allow self-regulation of the insurance industry in the United Kingdom, and exempt the conduct alleged in the Complaints from its antitrust laws. Regulation of the insurance industry for the conduct alleged in the Complaints has been effectively abandoned.

The Treaty of Rome, which controls the European Community, of which the United Kingdom is a part, precludes conduct like that alleged in the Complaints, as demonstrated in the *Wood Pulp* case.

The Sherman Act and the Treaty of Rome form an "international customary law" based upon legislation and practice prohibiting the conduct alleged in the Complaints.

The balancing of the factors in *Timberlane I* and *Mannington Mills* demonstrates that jurisdiction should

extend to the foreign reinsurers and their activities alleged in the Complaints.

ARGUMENT

I. THE INSURANCE INDUSTRY HAS A SIGNIFICANT IMPACT UPON BUSINESSES AND CONSUMERS IN THE UNITED STATES

The insurance business today is a worldwide enterprise consisting of intertwined businesses and individuals located in different countries. Decisions made in New York, London or Tokyo affect people and enterprises from outer space to the riot-torn areas of South Central Los Angeles.

A. The Assets Of The Insurance Industry Are In The Trillions Of Dollars And The Premiums Are In The Hundreds Of Billions Of Dollars Annually[2]

The insurance industry in the United States is divided into two broad categories: Property/Casualty Insurance and Life and Health Insurance.

The insurance industry has responsibility for assets which at the end of 1991 totalled more than $2.15 trillion. The property/casualty category, itself, is responsible for

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[2] Published and other materials not in the Record will be referred to herein under the "Brandeis Brief" concept. *Muller v. Oregon*, 208 U.S. 412, 421 (1908), in which the Court stated, "We take judicial cognizance of all matters of general knowledge."

assets which, at the close of 1991, totalled more than $601 billion.

Total premium receipts for 1991 were approximately $663.6 billion. Premium receipts for 1991 were nearly $223 billion for the property/casualty category, and $202.9 billion for the life insurance premiums and annuity considerations category. Premium receipts for the health insurance category for 1990 (the latest year for which data are available) were $237.7 billion[3].

The operating results for 1991 for property/casualty insurers show "net premiums" of $222,991,188,000 (approximately $223 billion); "premiums earned" of $222,150,735,000 (approximately $222 billion); "losses and loss adjustment expenses" incurred of $180,209,950,000 (approximately $180.2 billion) for a "loss and loss adjustment ratio" of 81.12%; "net investment income" of $34,246,720,000 (approximately $34.2 billion); "operating earnings after taxes" of $10,402,449,000 (approximately $10.4 billion); and "dividends" to stockholders of $5,758,007,000 (approximately $5.76 billion)[4].

The combined income of premium receipts and net investment income for 1991 was approximately $697.8 billion (or $.6978 trillion).

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[3] Insurance Information Institute ("III"), *The Fact Book 1993 Property/Casualty Insurance Facts*, 1993, ("III Fact Book 1993") p.5.

[4] *Id.*, inside cover, referencing A.M. Best, *Best's Aggregates & Averages Property-Casualty*, 1992.

B. The Annual Premiums In The Insurance Industry Are Approximately Four Times Greater Than The Annual Retail Sales Of New Automobiles

The retail sales of new automobiles in the United States, for the year 1990, was estimated to be approximately $147.838 billion[5].

A comparison of the retail sales of new automobiles of $147.838 billion to the insurance industry premium receipts of approximately $663.6 billion shows the insurance industry premiums to be over 400% greater than the retail sales of new automobiles.

C. A Comparison Of Total Insurance Industry Premiums To The United States Gross Domestic Product, Number Of Businesses, And Population Shows Each Business And Individual Being Accountable For $108,000 And $2,700, Respectively

In 1990, the gross domestic product ("GDP") of the United States was approximately $5.522 trillion, and in 1991, approximately $5.677 trillion[6].

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[5] Estimate was made by J.D. Power & Associates, a marketing information company which follows and is used by the automobile industry. The estimate was made by reference to *Automotive News, 1991 Market Data Book*, May 29, 1991, pp. 19-27, which contains statistics as to the number of automobiles sold in the United States for the year 1990. The average price of the automobile was determined to be $14,500, and this price was multiplied times the number of automobiles sold to obtain the estimate.

[6] United States Department of Commerce, Bureau of the Census, Bureau of Economic Analyses, Survey of Current Business, 1991.

A comparison of the $663.6 billion in insurance premiums with the GDP of 1990 and 1991 shows that the insurance premiums account for approximately 12% of the GDP in each year.

The population of the United States in 1990 was 248,709,873[7]. The number of businesses in the United States in 1989 (the last reported figure) was 6,107,413[8].

Using these figures as a basis, it may be determined that for all insurance premium income in 1991, each business in the United States accounted for an average of $108,500.00, in premiums and each man, woman and child in the United States accounted for an average of $2,700.00 in premiums.

For the category of property/casualty insurance premium income, the corresponding numbers would be approximately $35,000.00 for each business, and approximately $900.00 for each man, woman and child.

II. THE FACTS AND THE ALLEGATIONS OF THE COMPLAINTS DEMONSTRATE VIOLATIONS OF THE SHERMAN ACT

The undisputed facts were set out by the District Court in *In Re Insurance Antitrust Litigation*, 723 F.Supp. 464, 468-70 (N.D. Cal. 1989) and summarized by the

[7] United States Department of Commerce, Bureau of the Census, United States Census Population and Housing, 1990.

[8] United States Department of Commerce, Bureau of the Census, County Business Patterns, 1989.

Court of Appeals in *In Re Insurance Antitrust Litigation*, 938 F.2d 919, 922-925 (9th Cir. 1991).

The State of California Complaint and the State of Connecticut Complaint, filed after the California Complaint, are representative of Complaints filed by the various states and private plaintiffs.

The State of California Complaint alleges eleven claims for relief; eight claims allege violations of Section 1 of the Sherman Act (15 U.S.C. § 1) ("Sherman Act") and the remainder allege violations of state law.[9]

[9] The First Claim For Relief alleges a domestic conspiracy of primary insurers, the Reinsurance Association of America ("RAA"), a trade association of domestic reinsurers providing reinsurance on risks throughout the United States, and members of the RAA to coerce ISO to adopt restrictive terms and conditions in its CGL forms. The market is reinsurance coverage of CGL risks and the market for primary coverage of CGL risks. Cal. Compl. ¶ 112, Joint Appendix ("JA") 36. The alleged terms of the conspira are set out at Cal. Compl. ¶ 113, JA 36. The alleged acts are set out at Cal. Compl. ¶ 114, JA 36-37. The alleged effects are set out at Cal. Compl. ¶ 115, JA 37.

The Second Claim For Relief alleges a foreign conspiracy of Lloyd's of London reinsurers and primary insurers to coerce ISO to adopt restrictive terms and conditions in its CGL forms. The markets are reinsurance coverage of CGL risks and the market for primary coverage of CGL risks. Cal. Compl. ¶ 117, JA 38. The operative paragraphs contain the same allegations as Cal. Compl. ¶¶ 113, 114 and 115. Cal. Compl. ¶¶ 118, 119 and 120, JA 38-39.

The Third Claim For Relief alleges a joint conspiracy of primary insurers, RAA members and Lloyd's of London reinsurers to coerce ISO to adopt restrictive terms and conditions in its CGL forms. The markets are reinsurance coverage of CGL risks and the market for primary coverage of CGL risks. Cal. Compl. ¶ 122, JA 39 and 40. The operative paragraphs contain

The State of Connecticut Complaint alleges seven claims for relief; six claims allege violations of the Sherman

the same allegations as Cal. Compl. ¶¶ 113, 114 (with ¶ 114(a) adding the words "and jointly communicating those terms to the ISO Executive Committee on September 20, 1984") and 115. Cal. Compl. ¶¶ 123, 124, 125, JA 40-41.

The Fourth Claim For Relief alleges a conspiracy of ISO, primary insurers, RAA members and Lloyd's of London reinsurers to standardize the terms and conditions of CGL insurance coverage. The markets are reinsurance coverage of CGL risks and the market for primary coverage of CGL risks. Cal. Compl. ¶ 127, JA 41. The alleged terms of the conspiracy are set out at Cal. Compl. ¶ 128, JA 41-42. The alleged acts are set out at Cal. Compl. ¶ 129, JA 42. The alleged effects are Cal. Compl. ¶ 130, JA 42-43.

The Fifth Claim For Relief alleges a conspiracy of Lloyd's of London reinsurers to coerce primary insurers to only offer coverage on a claims-made basis. The markets are reinsurance coverage of CGL risks written on the occurrence form and the market for primary coverage of CGL risks on the occurrence form. Cal. Compl. ¶ 132, JA 43. The alleged terms of the conspiracy are set out at Cal. Compl. ¶ 133, JA 43. The alleged acts are set out at Cal. Compl. ¶ 134, JA 44. The alleged effects are set out at Cal. Compl. ¶ 135, JA 44.

The Sixth Claim For Relief alleges a conspiracy of Lloyd's of London reinsurers to boycott pollution coverage. (Pollution Boycott I). The markets are casualty reinsurance coverage for pollution risks and the market for primary casualty coverage of pollution risks. Cal. Compl. ¶ 137, JA 45. The alleged terms of the conspiracy are set out at Cal. Compl. ¶ 138, JA 45. The alleged acts are set out at Cal. Compl. ¶ 139, JA 45-46. The alleged effects are set out at Cal. Compl. ¶ 140, JA 46.

The Seventh Claim For Relief alleges a conspiracy by ISO, reinsurers and primary insurers to restrain trade in the commercial umbrella and excess insurance markets. The market is commercial umbrella and excess insurance coverages. Cal. Compl. ¶ 142, JA 46. The alleged terms of the conspiracy are set out at Cal. Compl. ¶ 143, JA 47. The alleged acts are set out at Cal. Compl. ¶ 144, JA 47. The alleged effect is set out at Cal. Compl. ¶ 145, JA 47.

The Eighth Claim For Relief alleges Lloyd's of London's, London Company Market's and a reinsurer's boycott of property pollution coverages. (Pollution Boycott II). The market is property insurance coverages for seepage, pollution and contamination exposures situated in North America, including the State of California. Cal. Compl. ¶ 147, JA 48. The alleged terms of conspiracy are set out at Cal. Compl. ¶ 148, JA 48. The alleged acts are set out at Cal. Compl. ¶ 149, JA 48. The alleged effects are set out at Cal. Compl. ¶ 150, JA 49.

The Ninth through Eleventh Claims For Relief allege violations of the California Business & Professions Code § 16700 *et seq.*, the Unfair Insurance Trade Practices Act, California Insurance Code § 790 *et seq.* and the California Business & Professions Code § 17200 *et seq.*, respectively. Cal. Compl. ¶¶ 151-156, JA pp. 49-50.

Act and the seventh alleges violations of the Connecticut Antitrust Act.[10]

III. DURING THE ALLEGED BOYCOTT YEARS OF 1984 THROUGH 1987, PROPERTY/CASUALTY INSURANCE PREMIUMS AND PROFITS ROSE UP TO APPROXIMATELY 300%

Statistics now available from insurance industry sources indicate a coincidental rise in premiums paid and

[10] The State of Connecticut Complaint contains substantial overlap with the California Complaint. The Connecticut Complaint alleges in its First Claim For Relief a conspiracy among all the defendants in the market for CGL property/casualty risks and for reinsurance and retrocessional insurance in connection therewith for the purpose of reducing financial exposures of such risks and increasing underwriting profits therefrom through the use of boycotts, coercion and intimidation. Conn. Compl., JA 88-90.

insurance industry profits during the years of the alleged boycotts.

A. From 1983 To 1987 General Liability Premiums Written Rose From Approximately $5.7 Billion To Approximately $20.9 Billion And Commercial Multiple Peril Premiums (Excluding Automobiles) Rose From Approximately $7.2 Billion To $17.2 Billion

CGL insurance falls within the category of property and casualty insurance. In 1986, according to the Complaints, CGL insurance premiums in the United States were $24.1 billion.[11]

During the years 1982 through 1991, general liability insurance[12] premiums written in billions of dollars and annual percentage changes and "line of business of" commercial multiple peril insurance, excluding automobiles, net premiums written and earned in billions of dollars were as follows:

[11] Cal. Compl. ¶ 47, JA 21; Conn. Compl. ¶ 39, JA 71.

[12] Coverage that pertains, for the most part, to claims arising out of the insured's liability for injuries or damage caused by ownership of property, manufacturing operations, contracting operations, sale or distribution of products, the operation of machinery; excluding injuries or damages in automobile accidents. III Fact Book 1993, pp. 28 and 110.

General Liability[13]

Year	Prems. Written ($1,000)	Annual Percent Change
1982	$ 5,668,459	-6.2
1983	**5,679,295**	**+ 0.2**
1984	**6,479,268**	**+14.1**
1985	**11,544,152**	**+78.2**
1986	**19,364,658**	**+67.7**
1987	**20,873,777**	**+ 7.8**
1988	19,077,182	- 8.6
1989	18,434,466	- 3.4
1990	18,123,123	- 1.7
1991	16,851,155	- 7.0

Commercial Multiple Peril[14]

Year	Net Prems. Written ($1,000)	Net Prems. Earned ($1,000)
1982	$ 7,009,385	$ 6,925,255
1983	**7,292,720**	**7,201,093**
1984	**8,286,962**	**7,875,565**
1985	**12,096,578**	**10,309,885**
1986	**16,190,282**	**14,618,481**
1987	**17,230,885**	**16,814,702**
1988	17,656,728	17,456,416
1989	17,468,204	17,402,226
1990	17,708,945	17,625,751
1991	17,031,833	17,187,177

[13] *Id.* p. 28 referring to A.M. Best, *Best's Aggregates & Averages Property-Casualty*, 1992.

[14] A.M. Best, *Best's Aggregates & Averages Property-Casualty*, 1992, p. 148

B. From 1985 Through 1987 The Insurance Companies' Total Profit As A Percent Of Net Premiums Earned Rose From 6.5 To 10.5, Return On Net Worth Rose From 9.7 To 18.4, Total Profit As A Percent Of Direct Premiums Earned Rose From 1.3 To 9.6, And Return On Net Worth Rose From 4.1 To 17.5

During approximately the same period of time, 1985 through 1990, the profits as a percentage of net premiums earned and the return on net worth of property/casualty insurance carriers for all lines of property/casualty insurance were as follows:[15]

TOTAL PROFIT AS PERCENT OF
NET PREMIUMS EARNED

YEAR	PERCENT
1985	**6.5**
1986	**8.6**
1987	**10.5**
1988	8.7
1989	8.0
1990	7.4

RETURN ON NET WORTH

YEAR	PERCENT
1985	**9.7**
1986	**14.2**
1987	**18.4**
1988	13.4
1989	9.9
1990	9.2

[15] National Association of Insurance Commissioners, *Report on Profitability by Line by State 1990*, November 1991, Profitability Results by State by Line Six Year Summary 1985-1990 Charts.

TOTAL PROFIT AS A PERCENT OF
DIRECT PREMIUMS EARNED

YEAR	PERCENT
1985	**1.3**
1986	**8.2**
1987	**9.6**
1988	8.9
1989	4.5
1990	5.9

RETURN ON NET WORTH

YEAR	PERCENT
1985	**4.1**
1986	**14.6**
1987	**17.5**
1988	14.4
1989	5.8
1990	8.1

IV. THE COMPLAINTS CLEARLY ALLEGE BOYCOTTS WHICH ARE NOT PROTECTED BY THE MCCARRAN-FERGUSON ACT

A. The Conduct Alleged In The Complaints Is Beyond Affirmative Agreements And Extends To Concerted Agreements To Refuse To Offer Coverage And The Implementation Of Such

The facts and conduct alleged in the Complaints show conduct by defendants to boycott nonconforming insurers and acts of boycott and coercion.[16]

This Court has decided only one case regarding the scope of the boycott exception to the McCarran-Ferguson

[16] *In Re Insurance Antitrust Litigation*, 938 F.2d at 928-929 and 930.

Act ("McCarran-Ferguson"):[17] *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978) ("*Barry*").

In *Barry*, the Court, at pages 546-550, specifically referred to the practices termed "boycotts" and "other types of coercion and intimidation" discussed in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944),[18] which were held to be nonexempt under McCarran-Ferguson, and extended such position by holding "the term boycott is not limited to concerted activity against insurance companies or agents or, more generally, against competitors of members of the boycotting group . . . ."[19]

The Court specifically stated the interpretation of the boycott exception at 438 U.S. 549-550.[20] The dissenters in *Barry* also concluded, at page 565, that conduct such as

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[17] 15 U.S.C. §§ 1011 *et seq.*

[18] These involved primary insurers conspiring with reinsurers to deny reinsurance to competing primary insurers until they agreed to the conspirators' terms and joined the conspiracy.

[19] The Court stated at page 544 as follows: "Whatever other characterizations are possible, [Footnote] petitioners' conduct fairly may be viewed as an 'organized boycott,' . . . The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott . . . ."

[20] "The rules and regulations of private associations in the industry, while providing Senator O'Mahoney with a vivid example of 'the sort of agreement which ought to be condemned,' *ibid*, exemplified a larger evil – '*regulation by private combinations and groups*,' *id.*, at 1483 – that required the continued application of the Sherman Act.[Footnote]. . . . "

alleged in the Complaints, was within the boycott exception of McCarran-Ferguson.

The conduct alleged in the Complaints not only encompasses boycotts by insurance companies of "noncooperating insurance companies", but also encompasses conduct to change the insurance industry by "private regulation" without state approval or regulation.

B. The Legislative History Of McCarran-Ferguson Indicates That The Act Would Not Protect Sherman Act Type Boycotts

The Court in *Barry* engaged in an extensive analysis of the legislative history of McCarran-Ferguson, concluding at 438 U.S. 541 that the term "boycott" should be interpreted in accordance with the tradition of the Sherman Act. The Court gave various examples of boycotts under the Sherman Act which included conditional concerted refusals to deal, as well as absolute refusals to deal, at pages 543 and 544, in addition to the reliance upon *South-Eastern Underwriters*, which itself contained a conditional refusal to deal.

"The language of § 3(b) is broad and unqualified; it covers 'any' act or agreement amounting to a 'boycott, coercion or intimidation.' If Congress had intended to limit its scope to boycotts of competing insurance companies or agents, and to preclude all Sherman Act protection for policyholders, it is not unreasonable to assume that it would have made this explicit. While the legislative history does not point unambiguously to the answer, it provides no substantial support for limiting language that Congress itself chose not to limit. [Footnote] (emphasis added)."

In essence, the Court in *Barry*, at page 549, adopted the position, as set forth by Senator O'Mahoney at 91 Cong. Rec. 1486 (1945), that the legislative history indicated that "combinations or agreements among the companies in the public interest, provided those combinations were in the open and approved by law," and if publicly supervised would be exempt, while "every effective combination or agreement to carry out a program against the public interest . . . would be prohibited."

V. THE MCCARRAN-FERGUSON EXEMPTION IS LOST WHEN INSURERS COMBINE WITH NON-EXEMPT PARTIES[21]

In *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979) ("*Royal Drug*"), this Court reiterated the principle "that exemptions from the antitrust laws are to be narrowly construed" (at page 232) and held that agreements between an insurer and retail pharmacies are not exempt from the antitrust laws.

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[21] McCarran-Ferguson provides that "no act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business unless such act specifically relates to the business of insurance provided that . . . the Sherman Act . . . the Clayton Act, and . . . the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by state law." 15 U.S.C. § 1012(b) (1988). "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation." *Id.* § 1013(b).

An analogy exists as to the foreign insurer defendants here. The pharmacies were not in the "business of underwriting insurance" and, therefore, outside of the intended regulation of the states by the nature of their actions with the insurers, but within the territory and jurisdiction of the states.

The "foreign reinsurers" are in reinsurance, and excess and surplus lines of insurance which are not regulated by the states and are located outside the territory of the states, and, therefore, are outside the intended regulation of the states.

The states cannot regulate beyond their borders.[22]

Although it may be argued that reinsurance is part of the "business of insurance", nothing in McCarran-Ferguson extends the "business of insurance" to entities which cannot be regulated by the states.

In essence, the Petitioners are attempting to *extend* the McCarran-Ferguson exemption to conduct between the regulated business of insurance and the non-regulated business of "foreign reinsurers".

Petitioners rely on the case of *Union Labor Life Ins. Co. v. Pireno* 458 U.S. 119 (1982) ("*Pireno*"), in which the court held that a health insurer's use of a professional association's peer review committee to render an opinion on the

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[22] See *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 81 (1938) and *Brief for the United States As Amicus Curiae*, filed August 2, 1992, pp. 7-8, Footnote 5, referring to the legislative history of McCarran-Ferguson recognizing the limitation on state regulatory authority (91 Cong. Rec. 1442 (1945) Statement of Senator McCarran).

necessity for treatments and reasonableness of charges did not constitute the "business of insurance" under McCarran-Ferguson.

Pireno, however, is not supportive of Petitioners' position.[23]

With *Pireno* as guidance, *Royal Drug* may be viewed to determine if agreements with foreign reinsurers, *which also do not involve ratemaking*, may be considered exempt under McCarran-Ferguson. This Court, in *Royal Drug*, did not view such agreements, even if considered part of the insurance business, to be exempt.[24]

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[23] In *Pireno*, this Court stated as follows, in referring to the business of insurance, at page 134: "We may assume that the challenged peer review practices need not be denied the § 2(b) exemption *solely* because they involve parties outside the insurance industry. But the involvement of such parties, even if not dispositive, constitutes part of the inquiry mandated by the *Royal Drug* analysis. As the Court noted there, § 2(b) was intended primarily to protect "*intra*-industry cooperation" in the underwriting of risks. 440 U.S., at 221, 99 S.Ct., at 1078 (emphasis added). Arrangements between insurance companies and parties outside the insurance industry can hardly be said to lie at the center of that legislative concern. More importantly, such arrangements may prove contrary to the spirit as well as the letter of § 2(b), because they have the potential to restrain competition in non-insurance markets."

[24] The Court stated, at pages 221 through 225, as follows: It is true that § 2(b) of the Act does create a partial exemption from those laws. *Perhaps more significantly, however, that section, and the Act as a whole, embody a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws* – a concept that had prevailed before the *South-Eastern Underwriters* decision (emphasis added).

* * *

The actions alleged in the Complaints have nothing to do with ratemaking; nor are they consistent with the "intra-industry" actions contemplated by Congress. Based upon *Royal Drug* and *Pireno* the McCarran-Ferguson exemption should not extend to the conduct between the domestic defendants and foreign reinsurers.

VI. STATE OFFICIALS COULD NOT, AND DID NOT, APPROVE THE ALLEGED BOYCOTT ACTIVITY THEREBY PRECLUDING ANY MCCARRAN-FERGUSON EXEMPTION

Although an argument might be made that active state supervision of such boycott activities alleged by the Complaints are exempt, the absence of such supervision

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The primary concern of both representatives of the insurance industry and the Congress was that *cooperative ratemaking efforts be exempt from the antitrust laws* (emphasis added).

* * *

The consistent theme of the remarks of other Senators also indicated a primary concern that cooperative ratemaking would be protected from the antitrust laws. Id., at 1444 and 1485 (remarks of Sen. O'Mahoney); 485 (remarks of Sen. Taft). *President Roosevelt, in signing the bill, also emphasized that the bill would allow cooperative rate regulation. He stated that "Congress did not intend to permit private rate fixing, which the Antitrust Act forbids, but was willing to permit actual regulation of rates by affirmative action of the States."* S. Rosenman, The Public Papers and Addresses of Franklin D. Roosevelt, 1944-45 Vol., p. 587 (1950) (emphasis added).

should mandate that the activities should not be exempt.[25]

Even if the McCarran-Ferguson exemption would not be lost, none of the states ever approved or, for that matter, considered, supervised or regulated the alleged reinsurance boycotts.

VII. EXTRATERRITORIAL JURISDICTION IS PROPER IN THIS CASE

The Complaints allege conduct by the foreign reinsurers (including retrocessional reinsurers) to combine and conspire to affect the United States market, acts taken in furtherance of such combinations and conspiracies, and effects upon the United States market.

In *United States v. Aluminum Company of America*, 148 F.2d 416, 443-445 (2d Cir. 1945) ("*Alcoa*"), the doctrine of United States jurisdiction over conduct abroad which was intended to affect the United States market and did have such an effect was developed.[26] Subsequent to *Alcoa*, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), ("*Continental Ore*") this Court held that a conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the

[25] See *FTC v. Ticor Ins. Co.*, 112 S.Ct. 2169, 2178-2179 (1992), which discusses immunity from the Sherman Act based upon state action.

[26] In *Alcoa*, the Court held that an agreement made abroad between a Canadian corporation and other foreign corporations limiting the importation of aluminum into the United States was unlawful under the Sherman Act if it is intended to affect United States imports and does have an effect on them.

reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.[27]

These concepts were reaffirmed by this Court in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) ("*Matsushita*"), footnote six at page 582, in which the Court reaffirmed *Continental Ore*, and stated, "[t]he Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce . . . ."

The Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a, added a new section 7 to the Sherman Act to establish that the Sherman Act does not apply to export or non-import foreign commerce unless the conduct involved has a direct, substantial, and reasonable foreseeable effect on domestic or import commerce, or export commerce.

Comparing the FTAIA to the concepts of *Alcoa*, *Continental Ore*, and later *Matsushita*, it may be determined that the FTAIA embodied the case law and codified such to employ a standard of "a direct, substantial and reasonably foreseeable effect" on United States commerce. Using this standard, the Court of Appeals was correct in its statement: "It is only in an unusual case that comity will require abstention from the exercise of jurisdiction".[28]

Based upon the allegations in the Complaints, jurisdiction over the foreign reinsurers exists. The specific

[27] 370 U.S. at 704.

[28] *In re Insurance Antitrust Litigation* 938 F.2d at 932.

allegations of the Complaints referred to a boycott in the U.S. market, even as such allegations relate to the excess and umbrella markets.[29]

VIII. COMITY DOES NOT PRECLUDE JURISDICTION OVER THE FOREIGN REINSURERS

In *Timberlane Lumber Co. v. Bank of America*, 549 F. 2d 597 (9th Cir. 1976) (*Timberlane I*) ("*Timberlane*"), the Court set out various factors to determine whether extraterritorial jurisdiction should occur.[30]

In *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) ("*Mannington Mills*"), the Court set forth another set of factors similar to *Timberlane* and added new factors.[31]

The American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States (1987) ("Restatement Third") set forth guidelines in sections 402 and 403 for the exercise of jurisdiction similar to those in

[29] See Footnote 7, page 9, of the *Brief for the United States as Amicus Curiae*, which adopts this position.

[30] The Court reviewed the effects doctrine and concluded at 549 F.2d page 613 that "[a] tripartite analysis seems to be indicated." The third part of such analysis is "the additional question which is unique to the international setting of whether the interests of, and links to, the United States – including the magnitude of the effect on American foreign commerce – are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." *Id*, 613.

[31] These are whether an order for relief would be acceptable in the United States if made by the foreign nation under similar circumstances and whether a treaty with the affected nations has addressed the issue. 595 F. 2d at 1297-1298.

Timberlane and *Mannington Mills*. Section 403(3) provides where two states are in conflict, after each state evaluates its own and the other state's interest in exercising jurisdiction, "a state should defer to the other state if that state's interest is clearly greater".

The Court of Appeals found all factors in favor of the exercise of jurisdiction except the first, "the degree of conflict with foreign law or policy".[32]

A. United Kingdom Law And Policy Does Not Directly Conflict With American Law And Policy So As To Override The Other Factors

Although the Court of Appeals found a conflict between United Kingdom ("U.K.") law and policy and American law and policy, such conflict is only superficial.

The Amicus Brief of the Government of the United Kingdom of Great Britain and Northern Ireland in Support of Petitioners ("U.K. Brief") sets forth the regulatory structure of the U.K. at pages 10-14. In referring to the Insurance Companies Act of 1982 and the governing of Lloyd's, the Brief admits at page 11 that "[t]he governing principle of the British Government's regulation of Lloyd's is that of self-regulation within the Lloyd's market, subject, of course, to the general laws set out above."

In referring to the Competition Act of 1980 ("Competition Act") and its regulatory effect, the U.K. Brief does

[32] The District Court found the factors in favor of the exercise of jurisdiction except the first, second, third, and fifth. It found the sixth factor to be neutral.

not mention that the anti-competitive practices controlled, dealt with and related to only "the production, supply or acquisition of goods in the U.K. or any part of it or supply or securing of services in the United Kingdom, or any part of it".[33] This law does not refer to activities within the United Kingdom which are intended to, and do, affect foreign markets.

Further, the Competition Act excludes orders under the Fair Trading Act 1973.[34] The Restrictive Trade Practices (Services) Order 1976[35] excluded persons covered by Part One of the Insurance Companies Act 1974 or Part Two of the Insurance Companies Act 1968.[36]

The Protection of Trading Interests Act 1980 specifically allows the U.K. to preclude enforcement of foreign judgments, such as treble damages.[37]

In essence, the regulatory scheme of the U.K. is not in substantive conflict with the Sherman Act except to the extent of multiple damages being imposed by a foreign court upon British citizens. However, even in this instance, United States courts have refused to allow comity to preclude the imposition of jurisdiction.[38]

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[33] Competition Act 1980 § 2(1), JA 291.

[34] *Id.*, § 2(3), JA 292; Fair Trading Act 1973, JA 298-302.

[35] JA 258-263.

[36] *Id.*, § 8, JA 263. These exclusions were acknowledged in the U.K. Brief at page 12.

[37] JA 281-290.

[38] *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (CA D.C., 1984). International comity is generally discussed at pp. 937-945.

The self-regulation in the U.K. effectively means that the U.K. Government has abandoned regulation of the insurance industry with respect to the areas alleged in the Complaints, and has thereby created the "private regulation" which is not exempt from the Sherman Act by McCarran-Ferguson.

B. European Community Law Is In Accord With United States Law In Extending Extraterritorial Jurisdiction

The Treaty of Rome refers to competition "within the common market".[39] The Treaty of Rome prohibits the activity alleged in the Complaints.

In Case No. 89/85, *A. Ahlstrom Osakeyhtio v. Commission*, 1988 E.C.R. 5193, 4 C.M.L.R. 901-44, CCH Common Market Reporter Court Decisions ("Common Market Reporter"), Transfer Binder, Cases Reported 1987-1988, ¶ 14,491, page 18,595 (1988) ("Wood Pulp Case") the Court held that non-community wood pulp producers who intend to, and agree to, fix prices for sales within the community, and do fix such prices causing an effect in the community, fall within the meaning of Article 85 of the Treaty of Rome.[40] Some of the defendants were United States companies whose actions occurred outside of the

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[39] JA 294 and implementing legislation for the U.K., JA 295.

[40] CCH Common Market Reporter, ¶ 14,491, page 18,611. The U.K. Brief at page 21 did not refer to this holding.

European Community ("Common Market") with implementation and effects within the Common Market.[41]

Under the Treaty of Rome, activities alleged in the Complaints, if done by non-Common Market members would be within the jurisdiction of Article 85 of the Treaty of Rome.

C. The Balancing Of The Factors Favors Jurisdiction

The Court of Appeals balanced the factors in favor of jurisdiction.

The U.K. does not regulate the conduct alleged in the Complaints. The self-regulation of the U.K. and the exemptions from its antitrust laws indicate that the U.K. has little or no interest in this conduct. The United States, on the other hand, has a significant interest in controlling such conduct.

The "additional factors" in *Mannington Mills* further warrant jurisdiction.[42]

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[41] United States authorities did not raise any objection regarding any conflict of jurisdiction when consulted by the European Commission pursuant to the OECD Council Recommendation of October 25, 1979, concerning Cooperation between Member Countries on Restrictive Business Practices affecting International Trade. *Id.*, p. 18,612.

[42] An order for relief is acceptable in the United States if made by a foreign nation under similar circumstances, as is shown by the United States decision not to raise objections in the Common Market Wood Pulp Case.

An international customary law which reflects a practice among nations is composed of legislation and court decisions. And international customary law for antitrust jurisdiction has developed between the United States and the Common Market in that each entity, by its own laws and court decisions, extends jurisdiction to the activities alleged in the Complaints.

Given this international customary law and all of the other factors, jurisdiction should extend to the activities alleged in the Complaints.

CONCLUSION

The decision of the Court of Appeals should be affirmed. American businesses and consumers should not be subjected to boycotts and coercive conduct as alleged in the Complaints.

The conduct alleged in the Complaints is a manifestation of "private interests" controlling markets with the intent to affect those markets and causing a substantial effect on those markets.

The effect of this conduct is to increase the participants' income and profits up to 300% and higher, while requiring businesses and consumers to either pay higher premiums or be without insurance, while also reducing and eliminating coverage.

An international customary law has developed between the United States and Europe precluding these actions.

The U.K., a member of the Common Market, by its laws has not manifested any interest to oppose or replace this international customary law, nor has it manifested any significant interest to avoid these laws. In essence, the U.K. Petitioners wish to obtain the benefit of the Treaty of Rome when foreign companies intend to affect and cause an effect on the U.K. market, while allowing U.K. companies to intend to affect, and cause a substantial effect on foreign markets. This duality should not be allowed to exist, and is not allowed to exist under the present international customary law.

Petitioners wish to extend the McCarran-Ferguson exemption beyond its intent and purpose, and wish to extend the notions of comity to a point of emasculation of domestic law and international customary law. These proposed extensions are unwarranted and should be rejected.

Respectfully Submitted,

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Nos. 91-1111; 91-1128

IN THE

THE SUPREME COURT of the UNITED STATES
October Term, 1992

Hartford Fire Insurance Co., et.al.
Petitioners

vs.

State of California, et. al.
Respondants

On Writ of Certiorari to the U.S.
Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF Respondents
~~PETITIONERS~~ OF
SERVICE STATION DEALERS OF AMERICA

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December 23, 1992

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Interest of the Amicus

The Service Station Dealers of America is the national trade association that serves as the voice of America's 50,000 independent gasoline retailers and thousands of auto repair nationwide. The proper interpretation of the McCarran - Ferguson Act is one of vital concern to the SSDA members and has a significant impact on the marketing of motor fuel in this country.

Specifically, the SSDA would call the Court's attention to the "real world" impacts of the conduct of the defendants in this case.

SUMMARY OF ARGUMENT

The primary issue addressed by SSDA is whether the conduct complained of constitutes a boycott within the meaning of the McCarran-Ferguson Act. The economic

effect of the actions of petitioners

demonstrates that a boycott as defined in the decisions of this Court, as well as the language, history and purposes of the Act has occurred.

ARGUMENT

I. The Economic Effect of the "Boycott"

One of the central allegations of the complaints by both the states, as well as of the private parties is that a boycott has occurred that has restricted or eliminated the availability of certain primary insurances.

As the Ninth Circuit made clear and petitioners concede, the domestic insurers desired to exclude pollution coverage from CGL policies, particularly that for gradual pollution. (Pet. Br. @ 5) . As the 9th Circuit noted in its opinion:

" The parties to the agreement

agreed to accept retrocessional insurance only from reinsurers who signed a letter of intent stating the following: "We hereby agree that we will use our best endeavors to ensure that all U.S.A. and Canadian exposed insurance/ reinsurance business attaching on or after 1st January 1987 will only be written where the original business includes a seepage and pollution excluding clause wherever legal and applicable." The effect of this agreement was to deny insurance consumers in the United States property coverage for seepage and pollution. " (J.A. at A-12).

Much of the defendants' argument is devoted to recasting the defendants conduct

into a framework of a mere agreement on insurance terms and conditions, which they argue is per se immune from antitrust scrutiny under McCarran - Ferguson. In fact, the domestic defendants go so far as to urge this Court to make clear that the agreements at issue are at " the core of the statute's protection and, as a matter of law, do not constitute a boycott." (Pet. Br. @ 26, 27). The SSDA urges the court in the strongest possible terms to decline this invitation. In effect, the defendants are asking this Court to pass the Walter-Hancock blanket antitrust immunity bill rejected by Congress in 1944, as opposed to the legislation which actually passed.

As discussed in detail, infra, SSDA members as well as numerous plaintiffs are COMPELLED BY FEDERAL LAW to seek pollution insurance for leaks from underground storage tanks. The net effect of the

defendant's conduct has been to leave SSDA members in the precisely same position as the plaintiffs in St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531, 98 S.Ct. 2923 (1978) - unable to obtain (federally mandated) insurance on any terms and conditions.

In Barry, this Court held that the term "boycott" as used in Section 3(b) of the McCarran Act includes boycotts directed at not just competitors, but also policy holders. 438 U.S. at 552. This case involves both, either of which is sufficient to defeat McCarran immunity.

The Court must be aware of the effect of defendants actions in this matter on the retail gasoline market.

One of the most significant issues for gasoline retailers is the management of underground storage tanks. These tanks are regulated under 42 U.S.C. 6991 et. seq.,

the Solid Waste Disposal Act. Pursuant to that Act, the Environmental Protection Agency was directed to, and has promulgated regulations covering technical standards, corrective action, and for the purposes of this case, financial responsibility. 42 USC 6991b.

42 USC 6991b (d) required that financial responsibility regulations be issued, with a minimum coverage level of $ 1,000,000 per occurrence for a gasoline retailer. The statue provides that the financial responsibility provisions may be satisfied by any one, or a combination of mechanisms, including insurance. 42 USC 6991b (d)(1). The legislative history of the provision indicates that Congress and the affected retailers believed insurance would be the primary mechanism for satisfying the requirement. See generally, Italiano, Liability For Underground Storage

Tanks, (2nd Ed. 1992).

Under 42 USC 6991b (d)(5)(D), the EPA Administrator is authorized to suspend enforcement of the financial responsibility requirements for a class or category of tank owner/operators upon a determination that methods of satisfying the requirement are not generally available.

The EPA Administrator has made the determination that underground tank pollution insurance is not available for SSDA's members, who typically own and/or operate 10 or fewer tanks. Consequently on October 31, 1990 the effective date of the financial responsibility rules was deferred until Oct. 26, 1991 (55 Fed. Regis. 46,022). On December 23, 1991 the Administrator once again suspended the compliance deadline for the financial responsibility rules until Dec. 31, 1993. (56 Fed. Regis. 66, 369).

As a result of the unavailability of insurance at any price, on any terms and conditions, over 40 states have enacted underground tank clean-up funds. These funds are financed through a variety of mechanisms, such as higher gasoline taxes. Despite the existence of these funds, and a federal fund to cover catastrophic leaks that acts as a liability cap, gasoline retailers cannot even obtain what is called a "wrap around policy". This type of policy covers the deductible amount in the state funds. For example, if a leak clean-up costs $ 100,000; many state funds will not cover the first $ 25,000. Insurance is not available even for this paltry exposure; a fact that SSDA members can attribute only to the conduct at issue.

Again, the net effect of the actions complained of has been to place an industry that affects the lives of almost every

citizen on a daily basis in the same position as the plaintiffs in Barry. Consequently, the SSDA urges that the boycott exception should defeat the McCarran claims and the judgment of the 9th Circuit should be affirmed. The language, legislative history, and purposes of the statute also support this conclusion.

II. The Language, History and Purposes of the McCarran-Ferguson Act

SSDA urges this Court to continue to hold that exceptions to the antitrust laws, including express exceptions should be narrowly construed, and that this canon of statutory construction applies with equal force to express statutory exceptions. Indeed, in Group Life and Health Ins.Co. v. Royal Drug Co., 440 U.S. 942 (1979), the Court has applied this rule with full force to the McCarran- Ferguson Act. This in turn

requires that the concept of "boycott" in cases where the McCarran- Ferguson Act is raised as a defense be construed broadly.

Several points on the legislative history of the Act should be appreciated. First, in response to the Southeastern Underwriters decision, legislation was proposed which would have granted a blanket antitrust exemption to the insurance industry. Such efforts were defeated in Congress, but faced a certain veto in any event. See generally, Weller, Language, Legislative History and Purposes of the Mc Carron- Ferguson Act, 1978 Duke L.J. 587, 591-606.

The législation which passed was not that pushed by the insurance industry, rather it was that promoted by the National Association of Insurance Commissioners, who were quite concerned that given the state of Commerce Clause jurisprudence in 1945,

their authority to tax and regulate the insurance business were subject to serious constitutional question. See, Weller, supra.

Not only did the blanket immunity bills fail to pass, at the insistence of those such as Sens. O' Mahoney and Pepper who defended the SEUA decision, the bill which passed affirmatively states that the antitrust laws SHALL APPLY to the business of insurance.

SSDA therefore takes issue with the statement in Petitioner's Brief at p. 23, that the dominant purpose of the Act is to provide antitrust immunity for the business of insurance, thus the boycott exception should be narrowly construed. The Act would not have passed and been signed into law but for the desire to preserve the ability of the states to regulate the industry. Even if there is sufficient state

regulation, the history of the Act is quite clear that in no case can a boycott escape antitrust scrutiny.

CONCLUSION

Accordingly, the decision of the Ninth Circuit should be affirmed as to the denial of both Mc Carran and state action immunity.

Respectfully submitted,

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Dimitri G. Daskal

Nos. 91-1111 and 91-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., ET AL., and MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, ET AL.,

Petitioners,

vs.

STATE OF CALIFORNIA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR NATIONAL LEAGUE OF CITIES, NATIONAL SCHOOL BOARDS ASSOCIATION, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS *AMICI CURIAE* SUPPORTING STATE RESPONDENTS

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In the

Supreme Court of the United States

October Term, 1992

HARTFORD FIRE INSURANCE CO., ET AL., and MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, ET AL.,

Petitioners,

vs.

STATE OF CALIFORNIA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR NATIONAL LEAGUE OF CITIES, NATIONAL SCHOOL BOARDS ASSOCIATION, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS *AMICI CURIAE* SUPPORTING STATE RESPONDENTS

Interests of the *Amici Curiae*

Amici curiae National League of Cities, National School Boards Association, and National Institute of Municipal Law Officers submit this brief for the Court's consideration.[1] *Amici* are not-for-profit organizations whose members consist of local government entities, and the administrators and legal officers who advise and govern them.

[1] This brief is being filed with the consent of the parties, whose letters of consent, signed by their representative Counsel of Record, have been filed with the Clerk of the Court.

The National League of Cities ("NLC") represents approximately 17,000 cities, towns and villages of all sizes. It serves its members as a national advocate in the legislative, administrative and judicial processes that affect them. It also develops national policy on municipal government needs, and offers training and research resources.

The National Institute of Municipal Law Officers ("NIMLO") is a non-profit, non-partisan organization which is dedicated to gathering and disseminating information on the most recent legal developments affecting municipalities. Its members include over 1500 municipalities, and over 17,000 attorneys are involved in NIMLO activities in their capacities as law officers of the respective members. NIMLO offers primary-source research services on various topics in municipal law; it also offers training seminars and litigation services to its members.

The National School Boards Association ("NSBA") is a federation of state associations of local school boards, the Hawaii State Board of Education, and the Boards of Education of the District of Columbia, the United States Virgin Islands and the Commonwealth of Puerto Rico. Representing over 15,350 local school boards, NSBA acts as a national advocate for its members on legislation and legal issues affecting local school boards. NSBA has a vital interest in matters affecting municipal law. For example, one of its largest member organizations, the New York State School Boards Association, Inc. ("NYSSBA"), is a not-for-profit corporate instrumentality of the public school districts of the State of New York, and represents approximately seven hundred forty (740) or ninety-four percent (94%) of such public school districts. Pursuant to section 1618 of the Education Law of the State of New York, NYSSBA has the responsibility of devising practical ways and means of attaining greater ec omy and efficiency in the administration of public school district affairs and projects.

Respondents' complaints allege that occurrence-based Commercial General Liability ("CGL") insurance, including the availability of policy forms providing insurance coverage for accidental pollution liability and defense costs, was severely restricted or became unavailable as a result of a coercive boycott

undertaken by the Petitioner domestic insurance companies and Petitioner foreign reinsurers, and that pollution and seepage coverage for property insurance was similarly restricted or made unavailable. The availability of such insurance, including coverage for accidental pollution liability, is a critical concern to local government entities.

For all practical purposes, local government entities are cut off from accidental pollution coverage altogether. *Amici curiae* have a substantial interest in the outcome of this case because it will materially affect the scope of market insurance coverage available to their members. Petitioners' actions have substantially reduced any opportunity which *Amici* previously enjoyed to secure accidental pollution insurance, and have significantly increased their insurance costs.

Summary of Argument

I. The McCarran-Ferguson Act, 15 U.S.C § 1012(b) (1988) ("McCarran") provides a federal antitrust exemption to the business of insurance only to the extent that such business is regulated by state law. The Ninth Circuit properly held that where regulated entities engage in injury-causing conspiratorial conduct with entities not subject to state regulations, the McCarran exemption does not apply. *In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991). Here, the principal Petitioner domestic primary insurance companies, Hartford Fire Insurance Co., CIGNA Corp., Aetna Casualty and Surety Company, and Allstate Insurance Co., (collectively, "the Hartford Group"), are alleged to have engaged in a conspiracy with Petitioner foreign reinsurance companies ("the foreign reinsurers") who are not subject to state regulation. Because state regulation, as a constitutional matter, cannot extend to the conduct of the Petitioner foreign reinsurance companies, there can be no "state regulation" within the meaning of McCarran for the conduct engaged in by the Hartford Group jointly with the foreign reinsurance companies, and thus the McCarran safe harbor cannot apply.

II. The Ninth Circuit also correctly found that McCarran does not apply to the conduct alleged in Respondents' complaints

because the McCarran antitrust exemption does not apply to "any agreement to boycott, coerce or intimidate, or act of boycott, coercion, or intimidation." *Id.*, 938 F.2d at 927 (*quoting* 15 U.S.C. §1013(b)). The Ninth Circuit correctly found a boycott in the conduct undertaken jointly by the Hartford Group and the foreign reinsurers. As alleged in the Respondents' complaints, domestic primary insurance companies, other than the Hartford Group, were willing to sell insurance policies based on proposed insurance policy forms which had been filed or lodged by the Insurance Services Office, Inc. ("ISO") with each of the respective states in 1984. These 1984 forms provided coverage for accidental pollution claims, were written on an "occurrence" basis (rather than a "claims-made" basis), and did not include a defense cost cap.

The Hartford Group opposed the terms contained in the 1984 forms, and after the 1984 forms were filed with the respective states by ISO, the Hartford Group coerced ISO into withdrawing them. This result was achieved through a singularly effective method — the Hartford Group conspired with Petitioner foreign reinsurers in an effort to refuse to provide any reinsurance coverage for the 1984 forms. Without reinsurance, primary insurance companies, as a practical matter, were precluded from selling insurance pursuant to the 1984 forms. Thus, despite the fact that the insurance industry had committed to the 1984 forms, as evidenced by ISO's filing of those forms with the state insurance commissioners, the Hartford Group's boycott achieved its goal: in 1986, the 1984 forms were withdrawn and replaced with forms which were acceptable to the Hartford Group and the foreign reinsurers. To ensure absolute adherence to the 1986 forms, ISO was coerced into withdrawing rating and statistical support for the pre-1986 forms, which effectively foreclosed any underwriting of risks based on those earlier forms.

III. The doctrine of comity does not insulate the foreign reinsurers from federal antitrust liability because their efforts were specifically directed at domestic commerce, which they have gravely harmed. The conspiracy entered into by the foreign reinsurers with the Hartford Group compelled the domestic primary insurance companies to, among other things, exclude pollution

coverage from CGL policies, or lose reinsurance for such risks. Availability of reinsurance is essential for primary insurance coverage; thus reinsurers can restrict the behavior of primary carriers, and control the destiny of their policyholders. While Petitioners' conspiracy was in progress, the president of one primary insurance company admitted that reinsurers exert critical control:

> Lack of reinsurance forced two insurers to temporarily stop writing liability coverage for public entities earlier this year. Forum Insurance Co. in Schaumburg, Ill. stopped underwriting public officials liability coverage for three months until this summer when it found reinsurance in London. . . . Calvert Insurance Co. in New York City also quit writing public entity liability coverages in January after losing its reinsurance, but resumed underwriting July 1 after securing reinsurance, said President and Chief Executive Officer John H. Walton. . . . "Our terms are dictated by our reinsurers," he commented.

M. Fletcher, *Public Entity Dilemma: Go Bare Or Bust*, Business Insurance, July 8, 1985, at 1.

The Petitioner Hartford Group and Petitioner foreign reinsurers seek to justify their conduct leading to the 1986 ISO forms revisions as simply an agreement on rates and terms protected by McCarran, but this completely ignores the unlawful manner in which such "agreement" was reached. The Respondents properly allege that the "agreement" as evidenced in the 1986 form filings was arrived at by anticompetitive conduct which is not protected by McCarran.

ARGUMENT

I. PETITIONERS FORFEITED ANY ANTITRUST IMMUNITY AVAILABLE TO THEM UNDER THE McCARRAN-FERGUSON ACT.

The McCarran Act provides insurance companies with immunity from antitrust laws on three conditions. In order to enjoy McCarran's protection, the Hartford Group must show: (1) that they are engaged in the business of insurance; (2) that their

actions are regulated by state law; and (3) that they have not engaged in any act of boycott, coercion or intimidation. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 124 (1982).

A. *An Insurance Company That Is Shielded From Antitrust Prosecution By The McCarran-Ferguson Act Loses That Protection When It Colludes With A Non-Exempt Party In Unregulated Injury-Causing Conduct.*

The Hartford Group assert that so long as they remain in "the business of insurance"[2] and are regulated by state law, McCarran protects any activities "*necessary and incidental*" to the business of insurance. Brief for the Petitioners Hartford Fire Insurance Co., *et al.* at 34 (emphasis added) (hereinafter "Hartford Br. at ___"). By that hazy standard, every business decision made by a member of the Hartford Group is arguably "incidental" to the business of insurance; neither Congress nor this Court has construed McCarran protection so liberally. Congress did not "exempt the business of *insurance companies* from the antitrust laws. It exempted only 'the business of *insurance*.' " *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 219 n.18, *reh'g denied*, 441 U.S. 917 (1979) (emphasis added). Congress's overriding concern was diminution of a state's ability to oversee ratemaking and policy formulation. *Group Life*, 440 U.S. at 224. When the Hartford Group conspired with foreign reinsurers as alleged in the Respondents' complaints, they attempted to thwart state authority because the foreign reinsurers stand outside the regulatory control of the respective states.

The members of the Hartford Group cannot defend their conduct as regulated by state law because no state insurance commissioner controls the activity of the foreign reinsurers in which the Hartford Group participated. The Hartford Group engaged in unregulated conduct jointly "with nonexempt parties," that allegedly caused antitrust injury. *Group Life*, 440 U.S. at 231. McCarran does not extend to agreements between

[2] To rule that McCarran protects conduct involving the "business of insurance," a court must find that the disputed practice: (1) effectively transfers or spreads

(Footnote continued)

regulated and unregulated insurance companies, pursuant to which they jointly undertake unregulated conduct which causes antitrust injury.[3]

In *Group Life*, an insurance company offered policyholders a discount on prescription drugs purchased at participating pharmacies; non-participants brought an antitrust claim against the insurance company, and alleged that this marketing plan dissolved McCarran immunity. The insurance company argued that the purchase plan spread risk by reducing policyholders' costs, but the Court rejected that point, and held that the insurance company forfeited its McCarran shield by combining with pharmacies which did not hold a corresponding McCarran exemption, and engaging in unregulated conduct with them. *Id.* at 211, 214-16. Three years later in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), the Court denied McCarran protection for a chiropractors' peer review committee which evaluated policyholders' treatment costs, because the chiropractors who made insurance claims determinations were themselves unregulated entities. *Id.* at 132-33.

The instant case involves another facet of the analysis used in *Group Life*. Though the Hartford Group is regulated by state insurance law, the foreign reinsurers are not, and the conspiratorial conduct engaged in by the Hartford Group and the foreign reinsurers jointly is beyond the reach of state regulation within the meaning of McCarran.

Contrary to the Hartford Group's argument, this conduct-based analysis does not bar a domestic insurance company from consulting with unregulated parties such as consumers, corporate risk managers or even foreign reinsurers, on drafting insurance rates or terms generally. Hartford Br. at 21. Such conduct only

a policyholder's risk; (2) is an "integral part of the insurance policy relationship" between insurance company and policyholder; and (3) is limited to parties which function within the insurance industry. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982).

[3] *See also SEC v. National Sec. Inc.*, 393 U.S. 453, 459-60 (1969). McCarran does not shield every business decision rendered by an insurance company as the "business of insurance." In this case, McCarran did not bar an SEC challenge to a proposed merger based on fraudulent misrepresentation.

runs afoul of the Sherman Act where, as here, joint efforts involve unregulated conduct that results in antitrust injury. *See also Beltz Travel Serv., Inc. v. International Air Transport Ass'n*, 620 F.2d 1360, 1366-67 (9th Cir. 1980) ("[T]he action of any of the conspirators to restrain or monopolize trade is, in law, the action of all.").

B. The Respective States Cannot Constitutionally Exercise Authority Over The Petitioner Foreign Reinsurers.

Because state law, as a constitutional matter, cannot extend to the conduct of the foreign reinsurance companies, there exists no "state regulation" within the meaning of the McCarran Act over the Hartford Group's joint conspiracy with the foreign reinsurers.

If neither party to a reinsurance contract is a domiciliary of the state in which an occurrence arises or a policyholder resides, and if the reinsurance contract was negotiated and executed in another jurisdiction abroad, that state will lack sufficient contacts with the reinsurer to enable it to exercise regulatory authority over the reinsurer's activity. A state's constitutional power to govern occurrences beyond its boundaries turns on its ability to govern the transaction or status from which that extraterritorial event flowed. *Alaska Packers Association v. Industrial Accident Commission of California*, 294 U.S. 532 (1935) upheld the state of California's power to exercise jurisdiction over a workers' compensation dispute involving a Mexican worker, hired in California but injured in Alaska, because the employment contract was executed in California, and was governed by state employment law. "[W]here the contract is entered into within the state, even though it is to be performed elsewhere, its terms, its obligations and its sanctions are subject, in some measure, to the legislative control of the state." *Id.* at 540-41. Due process accords a state the power to "effect legal consequences" of a dispute arising out of a contract executed pursuant to its law, or "if it has control over the status which gives rise to those consequences." *Id.*

Although McCarran *recognizes* a state's authority to regulate the business of insurance, it did not *grant* the several states authority over extraterritorial insurance business. *State Board*

of Insurance v. Todd Shipyards Corp., 370 U.S. 451, 456 (1962) held that the state of Texas had no power to levy a tax on an insurance premium paid to an out-of-state insurance company by a New York corporation which did business in Texas. The insurance contracts were negotiated and paid out-of-state, and losses were investigated, adjusted and paid out-of-state, though the risk was located in Texas. Insufficient Texas contacts existed to justify exercise of its taxing authority over the distant insurance transaction. The Court held that, according to the limits set by the Commerce Clause, McCarran does not authorize a state's extraterritorial control over foreign insurance contracts.

The *Todd* Court noted that McCarran maintained the limits of state regulatory authority as set forth in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922); and *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77 (1938). In *Connecticut General Life*, the Court invalidated a California state tax on reinsurance for primary insurance policies written in California, but paid in Connecticut, as follows:

> All that appellant did in effecting the reinsurance was done without the state and for its transaction no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state.

Id. at 82. *See also FTC v. Travelers Health Ass'n*, 362 U.S. 293, 300 (1960) (a single state's unfair trade law could not constitute regulation of interstate mail order insurance business, and therefore did not oust jurisdiction of Federal Trade Commission).[4] The control of each state over the foreign reinsurers' transactions is similarly limited. The foreign reinsurers certainly sell

[4] On the other side of the coin, application of a single state's insurance law to govern disputes over contracts executed by parties in distant jurisdictions threatens to work the "unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated." *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 649 (1950).

reinsurance to American clients on risks located within the United States. Joint Appendix of Petitioners and Respondents at 21-22 (hereinafter "J.A. at ___"). However, there is nothing in the record to indicate that these reinsurers maintain local agents or other representatives sufficient to enable the respective states to effect "control" over their reinsurance of risks based in America. *See* J.A. at 18-19, 73. *See also Alaska Packers*, 294 U.S. at 540-41.

As a practical matter, the respective states are powerless to enforce local laws against the foreign reinsurers because state regulatory structures are designed to operate within the constitutional limits discussed above. As an example, New York insurance laws cannot control activities "effected by mail from outside this state by an unauthorized foreign or alien insurer duly licensed to transact the business of insurance in and by the laws of its domicile . . . " New York Ins. Law § 1101(b)(2). The record does not suggest that the foreign reinsurance companies are licensed in any of the respective states. J.A. at 197-98, 212-13. Moreover, a recent GAO report to Congress acknowledged that states lack authority to regulate an out-of-state reinsurer's solvency. United States General Accounting Office, Report to the Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives, *Insurance Regulation: State Reinsurance Oversight Increased But Problems Remain* at 24-25 (May 1990). *See also id.* at 14-23, 25-30.

Congress passed the McCarran Act to enable state governments to regulate insurance, and to create a limited pocket of antitrust protection for legitimate joint efforts which are peculiar to "the business of insurance." When the Hartford Group entered into a conspiracy with the unregulated foreign reinsurers to coerce the withdrawal of the 1984 ISO filings, they lost their McCarran immunity because the states do not have the jurisdiction to regulate such joint conduct.

II. PETITIONERS' CONDUCT AMOUNTS TO "BOYCOTT" AND "COERCION" AND THUS IS NOT PROTECTED BY THE McCARRAN ACT.

An insurance company also forfeits its McCarran exemption by engaging in "boycott, coercion, or intimidation." 15 U.S.C. 1013 (b). This Court has held that the McCarran analysis of an alleged boycott uses the same standard as applied in examinations of alleged boycotts within the meaning of the Sherman Act: "a method of pressuring a party with whom one has a dispute by withholding, or *enlisting others to withhold*, patronage or services from the target." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 542 (1978) (emphasis added). The *Barry* Court refused to expand McCarran's protection of the insurance industry beyond its plain meaning:

> The language of § 3(b) is broad and unqualified; it covers "any" act or agreement amounting to a "boycott, coercion, or intimidation." If Congress had intended to limit its scope . . . it would have made this explicit. While the legislative history does not point unambiguously to the answer, it provides no substantial support for limiting language that Congress itself chose not to limit.

Id. at 550-51.

Respondents' complaints state that the Hartford Group agreed to boycott insurance companies who were willing to offer "occurrence" terms and more liberal pollution coverage than the restrictive policy terms which the Hartford Group favored. J.A. at 25-32, 77-80. To ensure that no competitor of the Hartford Group could offer such coverage, Respondents' complaints allege that the Petitioner Hartford Group conspired with the Petitioner foreign reinsurers to deny reinsurance to such competitors of the Hartford Group. J.A. at 31-32. Respondents further allege that the Hartford Group and the foreign reinsurers wielded their combined power to force ISO to withdraw the statistical support for its earlier policy terms, which ISO had published for many years, and which was essential to any CGL underwriter.

In fact, ISO withheld this data although some of its members depended on it. J.A. at 32-33. Thus Petitioner Hartford Group locked its potential competitors in a steel trap, cutting them off from two elements essential to any underwriter: statistical data upon which to calculate risks, and reinsurance to spread those risks.

ISO is the dominant ratings service in the insurance industry, and no other service matches its data bank; though ISO no longer publishes claims data on pre-1984 policies, it continues to maintain that information. J.A. at 19-20. There is no legitimate business purpose in ISO's withholding such a vital element of commerce from its members; so long as that ratings data is hidden from any insurance company who wishes to service the market for accidental pollution coverage, the Hartford Group's domination is secure. No competitor can offer accidental pollution coverage under terms which they disfavor; local government entities lack complete data upon which to project their own self-insurance costs, and even Congress has limited information for analyzing compliance with federal environmental law. *See, e.g.*, United States General Accounting Office, Report to the Congress, *Hazardous Waste: Issues Surrounding Insurance Availability* at 4-5, 28-31, 52-53, 75-77, 82-84 (October 1987).

The Hartford Group's boycott matches the features described in *Barry*; their agreement with the foreign reinsurers was "*a method of pressuring*" competitors who were willing to sell insurance coverage pursuant to the 1984 forms filed with the states. They "*enlisted others*" (the foreign reinsurers) "*to withhold patronage or services*", such as reinsurance, from those potential competitors. The foreign reinsurers and the Hartford Group applied a comparable "pressure" against ISO members to capitulate to their demands that ISO renounce its 1984 filings and substitute the 1986 forms. Similarly, to ensure that only the 1986 forms would be used, ISO was coerced by all the Petitioners to "withhold services" by withdrawing its statistical and rating support for the earlier forms. Thus the boycott created by the Hartford Group and the foreign reinsurers is exactly the coercive behavior which the *Barry* court condemned. *Compare*

Feinstein v. Nettleship Co. of Los Angeles, 714 F.2d 928 (9th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984) which upheld an agreement whereby medical malpractice insurance companies offered coverage solely to members of a physicians' association as a risk-spreading and risk-reduction mechanism. The high potential exposure inherent in such underwriting justified the arrangement.[5]

The foreign reinsurers' muscle is obvious; it is neither reasonable nor necessary to the "business of insurance" for influential players to foreclose such essential elements of commerce. The reinsurers' hammerlock on the Hartford Group's competitors corresponds to the restraint against consumers condemned in *Barry*. The strategy hatched by all the Petitioners is a refusal to deal with the proponents of the 1984 ISO forms; it attempts to manipulate McCarran to swallow the Sherman Act, and is a long way from the legitimate joint activity which McCarran protects. McCarran protects the domestic insurance companies' agreement to file the 1984 ISO forms, but the 1986 forms did not result from a similarly collegial consensus; ISO's "agreement" to revoke their 1984 filings and substitute the 1986 forms was solely the result of the boycott. J.A. at 27-30, 32-33.

The Hartford Group contends that they did nothing more than treat everyone on the same terms, limiting coverage for all clients. Hartford Br. at 36. However, Respondents' pleadings assert that the Hartford Group and the foreign reinsurers publicly threatened to withhold reinsurance from those domestic insurers who were willing to offer insurance coverage on pre-1986 terms, not from the entire market. J.A. at 25-27. Respondents' allegations also are reflected in a GAO Congressional report, which discovered that certain domestic insurance companies:

[5] Moreover, that agreement was clearly regulated by state insurance laws, as it ran between an insurance company and its policyholders, and policyholders had ample opportunities to secure comparable coverage from other vendors; thus the court found no corruption of McCarran's protection. *Feinstein*, 714 F.2d at 932-33.

> . . . acknowledged writing pollution coverage to some extent . . . [as] an accommodation to selected clients or continuation of a few older accounts. . . . We were told by industry representatives that quite a few other reinsurers may write this business [reinsurance for pollution liability] but that the companies would not be willing to admit it because they would not want their other customers coming to them to reinsure pollution risks.

United States General Accounting Office, *Report to the Congress, Hazardous Waste: Issues Surrounding Insurance Availability* at 22-23 (October 1987). This report also calls into question the credibility of the Hartford Group's assertion that reinsurance was offered on an equal basis throughout the market. Hartford Br. at 39.

The Hartford Group's brief presents a false challenge: they argue that the conduct alleged by Respondents does not amount to a boycott and does not rise to the level of an absolute refusal to deal, as in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, *reh'g denied*, 323 U.S. 811 (1944) ("*SEUA*"), which the Hartford Group claims is necessary to establish an insurance boycott under McCarran. Hartford Br. at 13. But this argument is without substance. As the Ninth Circuit held, establishing that a boycott exists is not predicated by finding an absolute refusal to deal. Rather, as held by the Ninth Circuit, "[t]he evil of a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms." *In re Insurance Antitrust Litigation*, 938 F.2d 919, 930 (9th Cir. 1991).

In any event, despite the Hartford Group's protests to the contrary, it is apparent from the record that the Hartford Group and the foreign reinsurers absolutely refused to deal with any primary carrier willing to sell insurance coverage pursuant to the 1984 filings. Thus, as found by the Ninth Circuit, a boycott was implemented. *See also Barry*, 438 U.S. at 544 ("boycotts are

not a unitary phenomenon"). Respondents' allegations that the boycotters conspired to withhold reinsurance in order to squelch Hartford's would-be competitors are sufficient to warrant a finding of antitrust violation. J.A. at 31-32, 41-49.

The Ninth Circuit and the district court both found that the direct effect of the boycott was to "restrain the availability of desired coverages in the markets in which plaintiffs purchase insurance." *In re Insurance Antitrust Litigation*, 938 F.2d. at 926; *In re Insurance Antitrust Litigation*, 723 F. Supp. 464, 483 (N.D. Cal. 1989). This conclusion comports with the boycott analysis developed by this Court over several decades. *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457 (1941). Congress foresaw the dangers of actions similar to this cartel when it debated the proposed McCarran legislation:

> [A]ny attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited by this provision.

J.A. at 222 (*quoting* remarks of Senator O'Mahoney, 91 Cong. Rec. 1481 (1945)). The Hartford Group warns that the Ninth Circuit's decision threatens the economic viability of the insurance industry. Hartford Br. at 48-49. But this Court has long regarded such grim prophecies with a skeptical eye. As the first Justice Harlan noted sardonically:

> It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions.

Northern Sec. Co. v. United States, 193 U.S. 197, 351 (1904) (Harlan, J.).

III. THE PETITIONERS' COERCIVE BOYCOTT ENJOYS NO PROTECTION UNDER THE DOCTRINE OF COMITY DUE TO ITS DIRECT, FORESEEABLE, AND SIGNIFICANT EFFECTS ON DOMESTIC TRADE.

The Ninth Circuit identified one factor which weighs in favor of abstention on the basis of comity: a perceived "conflict with a long-established British policy towards a venerable British trade, the underwriting of insurance." *In re Insurance Antitrust Litigation*, 938 F.2d 919, 934 (9th Cir. 1991) (*citing Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976), *appeal after remand*, 749 F.2d 1378 (9th Cir. 1984) ("*Timberlane II*"), *cert. denied*, 472 U.S. 1032 (1985)). But *Timberlane*'s balancing test dictates that when a foreign entity's conduct in the United States has direct, foreseeable and significant effects on domestic commerce, comity will not justify abstention. 749 F.2d at 1383-85.

Petitioners claim that it is perverse to hold the foreign reinsurers liable for antitrust violations if their actions are customary and legal at home. Brief for Petitioner Sturge Reinsurance Syndicate Management Limited at 18-21. But the foreign reinsurers set their sights directly upon domestic commerce. When the foreign reinsurers used the threat of a reinsurance boycott to intimidate the members of ISO into adopting the terms the Hartford Group favored in 1986, pollution coverage became extremely difficult for many policyholders to secure, and virtually nonexistent for municipalities and other local government entities.[6] When a foreign entity directs its commercial efforts to the American market, an intent to affect that market can be inferred, sufficient to establish subject matter jurisdiction. *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-45 (2d Cir. 1945) ("*Alcoa*"). *See also Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). The fact that the

[6] *See, e.g.*, M. Fletcher, *Liability Market Shrinking For Public Entities*, Business Insurance, Oct. 8, 1984, at 1, 30 (detailing various insurance companies which stopped providing liability coverage for public entities in the mid-eighties).

foreign reinsurers' actions had significant effect on domestic commerce, plus their specific intent to reach that market, undermines the doctrine of comity as a defense to their actions.

Coverage for pollution liability was severely restricted or unavailable following the Hartford Group's coercive action with the foreign reinsurers. J.A. at 45-46, 87-98. This precipitous loss of coverage wrought havoc in municipal budgets. In addition, as a Congressional study panel noted, CGL policy changes constrict competition at the same time insurance companies raise premiums. United States General Accounting Office, *Briefing Report to Congressional Requesters, Liability Insurance: Changes in Policies Set Limits on Risks to Insurers* at 19 (Nov. 1986).[7]

[7] In a 1987 report to Congress, the United States General Accounting Office noted that loss of pollution coverage has had significant consequences for enforcement of federal environmental laws:

> Pollution liability insurance continues to be generally unavailable. Although more than 100,00 companies generate, handle, or dispose of hazardous substances, few of them have insurance for pollution risks.
>
> GAO's survey of pollution claims closed in 1985 showed that insurers were generally not making high claims payments at that time. However, these claims are not necessarily indicative of the eventual magnitude of the insurance industry's pollution claims payments. Data on pollution claims closed after 1985 would be needed to establish trends in pollution claims payments. Currently, there is no central information source to capture data on all pollution claims.

United States General Accounting Office, *Report to the Congress, Hazardous Waste: Issues Surrounding Insurance Availability* at 2-3 (Oct. 1987). GAO indicated that its report, issued at the request of Congress upon enactment of the 1986 Superfund Amendments, suffered because insurance companies were incommunicative: many of them failed to respond to GAO's survey with information on pollution claims paid or pending, nor did they provide data on their reserves for pending pollution claims. GAO reiterated these criticisms in subsequent reports to Congress. *See, e.g.*, *Hazardous Waste: Pollution Claims Experience of Property/Casualty Insurers* at 1-3, 5-6 (Feb. 1991); *Insurance Regulation: State Reinsurance Oversight Increased, but Problems Remain* at 14-16 (May 1990).

The Hartford Group and the foreign reinsurers seek an unwarranted liberalization of the McCarran exemption. *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 127 (1982). If this Court reverses the Ninth Circuit's decision, it will allow insurance companies to circumvent the states' regulatory authority. This recalls President Roosevelt's warning when he signed the McCarran Act: "Congress did not intend to permit private rate fixing, which the Antitrust Act forbids, but was willing to permit actual regulation of rates by affirmative action of the States." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. at 224, *quoting* S. Rosenman, The Public Papers and Addresses of Franklin D. Roosevelt, Vol. 1944-45 p. 587 (1950).

Congress never intended to allow domestic insurance companies to employ foreign reinsurance agents in order to circumvent state insurance laws, as has happened here. Such reinsurers could operate a private rating system, running parallel to state statutory schemes, but beyond the reach of a state's enforcement powers. As the Ninth Circuit found, ". . . the defendants have gone beyond joint action to their own regulation of the terms on which CGL and property insurance will be offered." *In re Insurance Antitrust Litigation*, 938 F.2d 919, 930 (9th Cir. 1991).

If this Court reverses the Ninth Circuit's decision, nothing would prevent regulated domestic insurance companies from using similar coercive techniques involving unregulated foreign reinsurers, to limit other types of coverage, even if some primary insurance carriers were willing to provide it. This Court should affirm the Ninth Circuit's decision.

CONCLUSION

For the reasons stated above, *Amici* respectfully request that this Court affirm the decision of the Ninth Circuit.

Respectfully submitted,

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Nos. 91-1111 and 91-1128

In the Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

MERRETT UNDERWRITING AGENCY MANAGEMENT LTD., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether domestic insurance companies forfeited their antitrust immunity under the McCarran-Ferguson Act, 15 U.S.C. 1011-1015, if they conspired with foreign reinsurers that are not subject to regulation by the States.

2. Whether petitioners' alleged activities constituted a boycott for purposes of the McCarran-Ferguson Act.

3. Whether principles of comity require the dismissal of certain claims against the foreign reinsurers.

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INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcing the federal antitrust laws. Thus, it has a significant interest in both the scope of the antitrust exemption conferred by the McCarran-Ferguson Act and the application of principles of comity in antitrust cases.

STATEMENT

Respondents—19 States and numerous private parties—brought these consolidated actions against various primary insurers, reinsurers, insurance underwriters and brokers, and two insurance associations. Respondents allege that petitioners violated the federal antitrust laws, as well as state laws, by engaging in a conspiracy to coerce other insurance companies to alter the terms on which they sell insurance.

1. a. Commercial general liability (CGL) insurance protects the insured against the risk of liability to third parties for personal injuries or property damage. "Primary" insurers sell CGL insurance directly to businesses, nonprofit groups, and government entities. "Reinsurers" sell insurance to primary insurers. CGL insurers typically buy reinsurance for a significant portion of their risks. Reinsurance protects primary insurers from catastrophic losses, and also reduces the level of financial reserves that they are required to maintain. J.A. 9, 10, 16, 17, 18.[1]

For many years, primary insurers in the United States sold CGL insurance mainly on an "occurrence" basis. An occurrence policy covers claims whenever they are made, so long as they are based on incidents that occurred while the policy was in effect. An "occurrence" policy differs significantly from a "claims-made" policy, which covers only claims made during the policy period. Some claims-made policies include a retroactive date provision, which further restricts coverage to claims based on incidents that occurred after a specified date. For many years, CGL insurance covered "sudden" or "accidental" pollution

[1] Unless otherwise noted, references in this brief to respondents' allegations refer to the California complaint, J.A. 5-56. The allegations of the Connecticut complaint, J.A. 57-102, are generally similar to those of the California complaint. In this brief, "H. Br.," "M. Br.," and "S. Br." refer, respectively, to the briefs on the merits submitted to this Court by the Hartford petitioners, the Merrett petitioners, and the Sturge petitioners. References to "Pet. App." are to the Hartford petition appendix, No. 91-1111.

risks and obliged insurers to pay the full legal costs of defending a claim. J.A. 8, 23-35; Pet. App. 9a-10a.

In the early 1980s, petitioner Insurance Services Organization (ISO) undertook a revision of its 1973 CGL occurrence form.[2] Petitioner Hartford Fire Insurance Company, a leading primary insurer, tried to persuade ISO to replace its occurrence form with a claims-made form that included a retroactive date provision, and to eliminate coverage of sudden and accidental pollution and full payment of defense costs. Other primary insurers rejected Hartford's proposals. In March 1984, ISO filed with state insurance regulators standard CGL forms for both occurrence and claims-made insurance. Both types of policies covered sudden and accidental pollution damage and legal defense costs. The claims-made policy did not include a retroactive date provision. J.A. 22-24.

b. In response to ISO's action, petitioners allegedly engaged in a conspiracy to force other insurers to stop offering CGL insurance on terms that were objectionable to petitioners. After ISO filed the March 1984 forms, Hartford and General Re, the largest American reinsurer, met and agreed to "coerce ISO to adopt" Hartford's demands, or "failing that, 'derail' the entire ISO CGL program." J.A. 24. At General Re's instigation, members of the Reinsurance Association of America (RAA), a trade association of domestic reinsurers, "agreed to boycott the 1984 ISO forms unless a retroactive date was added to the claims-made form, and the pollution exclusion and a defense cap were added to both forms." J.A. 15, 25. RAA implemented the agreement by telling ISO that RAA "members would not provide reinsurance for coverages written on the 1984 ISO CGL forms." J.A. 25. Loss of reinsurance presented a significant threat to primary insurers.

[2] ISO is an association of about 1,400 domestic property and casualty insurers that collects statistical data, estimates insurance risks, develops standardized policy forms, and files the standardized forms with state insurance departments. J.A. 19; H. Br. 3.

Petitioners Hartford, Aetna, CIGNA, and Allstate allegedly recruited various London reinsurers to join the boycott of uncooperative American primary insurers.[3] J.A. 25-27. At an ISO Executive Committee meeting on September 20, 1984, "the foreign and domestic reinsurer representatives presented their agreed upon positions that there would be changes in the CGL forms or no reinsurance." J.A. 29. After this meeting, ISO withdrew the 1984 CGL forms and filed a new claims-made form with state insurance regulators that included a retroactive date and excluded all pollution coverage. ISO also filed a new occurrence form that excluded pollution coverage. *Ibid.*

Even after ISO withdrew the 1984 forms and submitted revised forms to the States, a group of Lloyd's reinsurers and others allegedly continued to employ boycotts and coercion to force complete elimination of ISO's CGL occurrence form. Lloyd's reinsurers collectively refused to write new reinsurance treaties or to renew long-standing treaties unless U.S. primary insurers switched from the occurrence form to the claims-made form.[4] It was announced that "Lloyd's of London was withdrawing entirely from the business of reinsuring primary U.S. insurers who wrote on the occurrence form." J.A. 30-31. Lloyd's reinsurers also revised reinsurance treaties to cut

[3] The London reinsurers included several at Lloyd's of London. Lloyd's is a marketplace or exchange where syndicates (separately capitalized, independently operated groups of investors) transact their business. A Lloyd's policy may be underwritten by dozens of individual syndicates, each sharing a portion of the risk. Lloyd's provides North American consumers with both insurance and reinsurance. Respondents allege that approximately half of Lloyd's casualty business involves North American risks. J.A. 11, 17.

[4] A reinsurance "treaty" is a contract by which a primary insurance company transfers to a reinsurer a portion of a category of risks which the reinsurer obligates itself to cover during the term of the treaty. The treaty period is usually one year. J.A. 10, 17.

off reinsurance for claims filed after a specified "sunset date." *Ibid.*

In mid-1987, ISO ended its support of the 1973 CGL occurrence form, including data collection and actuarial services. Since most ISO members could not afford to gather the data needed to continue using the 1973 occurrence form, that form has fallen from use. In addition, ISO responded to pressure from domestic and London reinsurers and others by developing standardized policy language for CGL excess and umbrella forms that conforms to the limitations of the revised CGL forms. The revisions apparently were intended to prevent policyholders from substituting excess and umbrella insurance for the discontinued forms of CGL insurance. J.A. 33-34.[5]

2. The district court dismissed the complaints. Pet. App. 33a-84a. It concluded that the challenged conduct was immune from the federal antitrust laws under the McCarran-Ferguson Act, 15 U.S.C. 1011-1015. Pet. App. 45a-47a. The court held that the challenged activities were part of the "business of insurance" and were "regulated by State law" through licensing of ISO, state approval of policy forms, and state unfair insurance trade practice statutes. *Id.* at 47a-50a. In addition, the court held that petitioners' alleged conduct was not within the "boycott" exception to McCarran-Ferguson immunity, because petitioners did not refuse to deal on any terms, nor did they go "beyond the making and implementation of agreements to do business only on terms acceptable to the participant." *Id.* at 50a-57a.

The district court further held that the complaint alleged a direct, substantial, and reasonably foreseeable

[5] Respondents also allege that the London reinsurers boycotted pollution liability coverage by jointly agreeing to exclude all such coverage from casualty reinsurance treaties. J.A. 31-32. In addition, respondents allege a boycott of property pollution insurance and reinsurance by "retrocessional" insurers, who insure reinsurers. J.A. 34-35.

impact on U.S. commerce, and thus established subject matter jurisdiction. Pet. App. 65a-67a, 73a-74a. Applying the multi-factor test adopted in *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), however, the court concluded that principles of comity required dismissal of three counts (Counts 5, 6, and 8 of the California Complaint) that assert claims against London reinsurers and unnamed co-conspirators. The court concluded that application of U.S. antitrust laws to the conduct alleged in those counts would lead to a significant conflict with British law and policy, and that the other *Timberlane* factors did not outweigh this conflict. Pet. App. 75a-83a.[6]

3. The court of appeals reversed. Pet. App. 1a-32a. It agreed with the district court that reinsurance is part of the "business of insurance" for purposes of the McCarran-Ferguson Act, Pet. App. 18a, but concluded that petitioners were not entitled to immunity under that Act for two independent reasons. First, the court held that regulation of foreign reinsurance is beyond the jurisdiction of the States, and "consequently, McCarran-Ferguson Act immunity does not attach to the foreign defendants." *Id.* at 20a. Although the U.S. primary insurers, reinsurers, and insurance brokers are subject to state regulation and "therefore prima facie immune," the court concluded that the domestic petitioners lost that immunity when they conspired with foreign reinsurers that are not subject to state regulation. *Ibid.*

Second, the court held that petitioners' alleged conduct falls within the exception to the McCarran-Ferguson im-

[6] The district court also held that petitioners were immune under the state action doctrine to the extent that respondents' allegations concern actions related to development of the CGL forms. Pet. App. 59a-63a. But the court rejected petitioners' argument that respondents lacked antitrust standing. *Id.* at 65a-67a. Because it dismissed all the federal claims, the court also dismissed the pendent state law claims. *Id.* at 83a.

munity for acts of "boycott, coercion, and intimidation." Pet. App. 20a-25a. The court noted that Hartford allegedly enlisted domestic and foreign reinsurers "to compel capitulation" by the boycotted group—ISO and primary insurers that refused to go along with petitioners' demands. *Id.* at 22a. The court rejected the district court's view that respondents had to show a refusal to deal on any terms, noting that "the evil of a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms." *Ibid.*

The court of appeals agreed with the district court that the court had subject matter jurisdiction of the three claims (Cal. Compl. Counts 5, 6, and 8) naming only British parties acting in the United Kingdom. Pet. App. 27a-28a. It then applied the *Timberlane* comity analysis. Like the district court, it concluded that application of the antitrust laws to the London reinsurance market would lead to significant conflict with British law and policy. But the court of appeals concluded that five additional factors pointed to retention of jurisdiction: nationality and location of the parties; enforceability of decrees; relative national significance of economic effects; purpose to affect U.S. commerce; and foreseeability of such effects. These factors, the court of appeals concluded, significantly outweighed the one factor favoring abstention. *Id.* at 27a-32a.[7]

SUMMARY OF ARGUMENT

1. The court of appeals erred in concluding that a domestic insurance company automatically loses its anti-

[7] The court of appeals affirmed the district court's ruling that respondents have standing, Pet. App. 19a-21a, and reversed the district court's state action ruling, *id.* at 29a-30a. This Court excluded those issues from its limited grant of certiorari. They are addressed in the brief amicus curiae we filed at this Court's invitation at the petition stage. See U.S. Br. 16-22.

trust immunity under the McCarran-Ferguson Act when it acts in concert with a "non-exempt entity" such as a foreign reinsurer. The McCarran-Ferguson immunity applies to the "business of insurance to the extent that such business is * * * regulated by State law." 15 U.S.C. 1012(b). Accordingly, the analysis should focus on the nature of the *activity* at issue rather than the nature of the *entities* involved in that activity.

Although that aspect of the court of appeals' reasoning was flawed, the court reached the correct result. McCarran-Ferguson confers no antitrust immunity on "boycott[s], coercion, or intimidation." 15 U.S.C. 1013(b). Consequently, if, as the court of appeals also held, petitioners are alleged to have engaged in conduct that falls within the boycott exception to McCarran-Ferguson immunity, their conduct is subject to the federal antitrust laws without regard to whether it was "the business of insurance" or "regulated by state law."

2. Respondents' complaints allege that petitioners engaged in a scheme of "boycott, coercion, or intimidation" within the meaning of McCarran-Ferguson. Agreements among insurers to fix rates or terms of coverage are entitled to antitrust immunity when regulated by the States. But the complaints do not allege simple agreements on the rates and terms that the parties would offer. Instead, respondents allege that petitioners agreed to compel other primary insurers to adopt policy terms that those insurers did not wish to adopt, by preventing the dissenters from obtaining reinsurance.

The alleged conduct was a McCarran-Ferguson boycott. Primary insurers "enlist[ed] * * * third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group." *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 544-545 (1978). The alleged activity was also an "attempt[] by members of the insurance business to force other members to follow the industry's private rules and practices." *Id.* at 565

(Stewart, J., dissenting). Petitioners' alleged conduct is strikingly similar to the insurance boycott condemned in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). In that case, denial of reinsurance was the principal weapon used to enforce uniform insurance rates.

Petitioners' contention that a McCarran-Ferguson boycott is limited to absolute refusals to deal is untenable. Congress expressly created an exception to the McCarran-Ferguson immunity for "any * * * act of boycott, coercion, or intimidation." 15 U.S.C. 1013(b). "Coercion" and "intimidation" plainly include the use of power to compel the victim to do something—*i.e.*, a conditional refusal to deal. In addition, a Sherman Act "boycott" does not require an absolute refusal to deal. If the boycott exception were limited to absolute refusals to deal, McCarran-Ferguson would immunize virtually any form of joint coercive activity, so long as insurance companies sought merely to "discipline" their victims rather than drive them out of business. For similar reasons, a McCarran-Ferguson boycott includes schemes in which the enforcer is willing to deal with the instigators and the victims on equal terms.

3. Principles of comity do not require dismissal of respondents' claims that London-based reinsurers violated the Sherman Act by agreeing not to sell reinsurance to certain primary insurers in the United States. The courts below correctly concluded that they had subject matter jurisdiction over these claims. The Sherman Act expressly applies to acts "in restraint of trade or commerce * * * with foreign nations." 15 U.S.C. 1, 2. In addition, the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a, makes it clear that Congress intended the Sherman Act to apply to restraints that have a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce. Respondents have alleged such an effect in this case.

We agree with the court of appeals that principles of comity are properly invoked in antitrust cases even though the U.S. court has subject matter jurisdiction. The comity doctrine was already established when Congress enacted the Sherman Act, and the enactment history of the FTAIA indicates that Congress has not countermanded the federal courts' ability to employ principles of comity. The seven factors set out in the Ninth Circuit's decision in *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (1976), provide a useful approach to analyzing questions of comity.

In applying the *Timberlane* factors, we believe the courts below erred in finding that application of U.S. antitrust law would create a conflict with foreign law. In our view, a conflict for comity purposes exists only if (1) a foreign government has directed the defendants to engage in the disputed conduct, or (2) the defendants would have frustrated clearly articulated policies of the foreign government if they had not engaged in the disputed conduct. That standard is not met here. In any event, the court of appeals correctly concluded that other relevant factors support the exercise of jurisdiction and outweigh any possible conflict.

ARGUMENT

I. AN INSURANCE COMPANY DOES NOT FORFEIT ITS IMMUNITY UNDER THE McCARRAN-FERGUSON ACT MERELY BY ACTING IN CONCERT WITH NON-EXEMPT ENTITIES

Petitioners in No. 91-1111 (the Hartford petitioners) contend (H. Br. 15-24) that the court of appeals erred in concluding that they are not entitled to McCarran-Ferguson immunity because they allegedly conspired with foreign reinsurers that are not subject to regulation by the States. The court of appeals reasoned that "[m]embership of an exempt entity [*i.e.*, a domestic insurer] in a conspiracy with nonexempt entities [*i.e.*, foreign reinsurers] makes the exempt entity liable." Pet. App. 20a. The court therefore concluded that "the domestic defendants' immunity [under McCarran-Ferguson] was lost when they conspired with the foreign defendants." *Ibid.* Although we agree with petitioners that the court of appeals' brief discussion of immunity "forfeiture" is analytically flawed, the court's error had no effect on the judgment.

1. By its terms the McCarran-Ferguson Act exempts from the federal antitrust laws "the business of insurance to the extent that such business is * * * regulated by State law." 15 U.S.C. 1012(b). The language of the statute focuses on the nature of the activity at issue—whether it is "the business of insurance"—rather than the nature of the entity at issue. See *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459 (1969) (Act "refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance'"); see also *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 211 (1979). Consequently, the focus of analysis should be on (1) whether a particular activity is part of the business of insurance, and (2) whether the activity is regulated by state law.[8]

We agree with petitioners that when primary insurers merely agree on the insurance rates and forms that they plan to offer, they are engaged in "the business of insurance." So long as this activity is regulated by the States, it is immune from the federal antitrust laws under McCarran-Ferguson. If primary insurers consult with domestic or foreign reinsurers to determine whether the reinsurers would be willing to provide reinsurance under the proposed forms or rates, that interaction does not,

[8] The language of McCarran-Ferguson differs from the language of other federal statutes that confer antitrust immunity. For example, the Capper-Volstead Act confers immunity on "[*p*]*ersons* engaged in the production of agricultural products." 7 U.S.C. 291 (emphasis added).

without more, strip the primary insurers of antitrust immunity. Congress understood that consultation between primary insurers and reinsurers, including foreign reinsurers, is common. See, *e.g.*, H.R. Rep. No. 873, 78th Cong., 1st Sess. 9 (1943) ("Knowledge in advance of what rates and policies will be, is desirable * * *. This is particularly true in the case of reinsurance * * *. No company could safely agree in advance to reinsure, unless it knew what the terms of its obligation would be."); *Joint Hearing on S. 1362, H.R. 3269, and H.R. 3270 Before the Subcomms. of the Comms. on the Judiciary*, 78th Cong., 1st Sess. 116 (1943) (Joint Hearing) (statement of Rep. Hancock) ("The necessity for * * * agreement upon rates in advance was made clear in the matter of reinsurance."). Accordingly, the court of appeals was wrong to conclude that the domestic insurers lose their antitrust immunity merely by including foreign reinsurers in agreements that would otherwise be immune.[9]

2. Although the court of appeals' reasoning is flawed, its judgment is correct. McCarran-Ferguson confers no antitrust immunity on "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. 1013(b). No State may authorize any boycott, coercion, or intimidation; such acts or agreements remain

[9] Of course, the challenged activity is not immune under McCarran-Ferguson unless it is "regulated by State law." 15 U.S.C. 1012(b). The insurance industry has long recognized that there may be no McCarran-Ferguson immunity for agreements among foreign or domestic reinsurers on the rates and terms of reinsurance, because such agreements typically are not subject to state regulation. See Havens & Theisen, *The Application of United States and EEC Antitrust Laws to Reinsurance and Insurance Pooling Arrangements*, 54 Antitrust L.J. 1299, 1303-1309 (1986); Aldrich, *Regulation, Accounting, and Statistics*, in *Reinsurance* 615, 621-622 (Robert Strain ed. 1980); ABA, *Report of the Commission to Improve the Liability Insurance System* 25 (1989); Thompson, *Critical Issues of the Eighties: How Trends in Reinsurance Will Affect Legal, Legislative, and Regulatory Actions*, in 16 Forum 1038, 1055 (1981).

fully subject to the antitrust laws. See S. Rep. No. 20, 79th Cong., 1st Sess. 3 (1945); H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945) ("at no time are the prohibitions in the Sherman Act against any [agreement or] act of boycott, coercion, or intimidation suspended. These provisions of the Sherman Act remain in full force and effect"); 91 Cong. Rec. 480-481 (1945) (statement of Sen. Ferguson) (state law that "undertook to authorize a boycott, a coercion or an intimidation * * * would be clearly void."). See also *id.* at 479, 1443, 1481. As we discuss below, see pp. 13-22, *infra*, respondents have alleged that petitioners engaged in "boycott, coercion, or intimidation" within the meaning of McCarran-Ferguson. Accordingly, the Act does not afford a basis for dismissing respondents' antitrust claims.[10]

II. PETITIONERS' ALLEGED CONDUCT WAS "BOYCOTT, COERCION, OR INTIMIDATION" WITHIN THE MEANING OF THE McCARRAN-FERGUSON ACT

The Hartford petitioners contend (H. Br. 24-50) that respondents' complaints do not allege any "boycott, coercion, or intimidation" within the meaning of McCarran-Ferguson. We disagree. Petitioners' arguments rest on an unduly narrow view of the boycott exception to Mc-

[10] Respondents' claim that petitioners conspired to restrain trade in the markets for commercial umbrella and excess insurance does not specifically allege that petitioners engaged in boycott, coercion, or intimidation in those markets. See J.A. 46-47. But respondents allege that petitioners' conspiracy to alter the terms of excess and umbrella insurance was intended to "conform to the revised ISO CGL forms," and thereby prevent policyholders from substituting excess or umbrella insurance for the discontinued types of CGL insurance. J.A. 34. We therefore believe that the complaints adequately allege that the agreements concerning excess and umbrella insurance were in aid of the boycott against competing insurers.

Carran-Ferguson immunity and of the allegations in respondents' complaints.[11]

1. a. Congress enacted the McCarran-Ferguson Act in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (*SEUA*). Prior to *SEUA*, it generally had been assumed that "[i]ssuing a policy of insurance is not a transaction of commerce." *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869). *SEUA* held that "the business of insurance is interstate commerce, and that the Congress which enacted the Sherman Act had not intended to exempt the

[11] We express no view on the merits of this case. Because the action was dismissed on the pleadings, respondents' allegations must be taken as true. *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531, 534 (1978). In 1987, the Antitrust Division of the Department of Justice concluded that the primary cause of the crisis in property-casualty insurance was "unanticipated changes in the manner in which tort liability has been established and damages assessed." Antitrust Div., U.S. Dep't of Justice, *The Crisis in Property-Casualty Insurance*, in Tort Policy Working Group, *An Update on the Liability Crisis* App. 1 (1987). Our general assessment of the central cause of the insurance crisis does not, of course, rule out the possibility of specific instances of collusion.

We also intend no criticism of the district court's use of judicial management techniques to require the parties to focus their contentions and resolve as many legal and factual issues as possible without trial. On the contrary, we strongly endorse the use of such techniques to streamline antitrust litigation.

In addition, as we explain in our brief at the petition stage (at 14-16), petitioners' conduct may have been entirely lawful even if it is not immune under McCarran-Ferguson. Further development of the facts may reveal that petitioners' alleged activities are subject to analysis under the rule of reason rather than the *per se* rule. Petitioners would have an opportunity to make "plausible arguments that [the challenged practices] * * * were intended to enhance overall efficiency and make markets more competitive." *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985). In that case, *per se* condemnation would be warranted only if it could be shown that the "likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote." *Ibid.*

insurance industry from its coverage." *Royal Drug*, 440 U.S. at 217.

The McCarran-Ferguson Act made clear that the States may regulate insurance companies without fear of Commerce Clause attack. *Royal Drug*, 440 U.S. at 217-218 & nn.16, 18; *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 429-431 (1946). The Act also conferred a limited exemption from the federal antitrust laws. The exemption applies only to "the business of insurance to the extent that such business is * * * regulated by State Law," 15 U.S.C. 1012(b), and only to activity that is not an "act of boycott, coercion, or intimidation," or an "agreement to boycott, coerce, or intimidate." 15 U.S.C. 1013(b).[12]

b. This Court addressed the scope of the boycott exception to McCarran-Ferguson immunity in *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531 (1978). In *Barry*, four medical malpractice insurers agreed that three of them would not sell malpractice insurance to policyholders of the fourth, in order to force the policyholders to accept "claims made" coverage in place of "occurrence" coverage. 438 U.S. at 535. The Court held that the boycott exception was not limited to "only those combinations which target *competitors* of the boycotters." *Id.* at 542. The Court observed that "[t]he language of § 3(b) is broad and unqualified; it covers 'any' act or agreement amounting to a 'boycott, coercion, or intimidation.'" *Id.* at 550. The Court also noted that "Congress * * * employed terminology that evokes a tradition of meaning, as elaborated in the body of decisions interpreting the Sherman Act," and that "[i]t may

[12] The House of Representatives initially passed a bill that would have conferred a blanket antitrust exemption on the insurance industry. See *Royal Drug*, 440 U.S. at 219 & n.20. Because Congress ultimately *rejected* that approach, petitioners' citations (H. Br. 19-20, 32-34) to the legislative history of the initial House bill (H.R. 3270) must be viewed with great caution.

be assumed * * * that Congress intended this language to be read in light of that tradition." *Id.* at 541. Drawing on its Sherman Act jurisprudence, the Court stated that "[t]he generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting [the aid of] others to withhold, patronage or services from the target." *Ibid.* And the Court concluded that "[t]he enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott." *Id.* at 544-545.[13]

Although the dissenting Justices in *Barry* concluded that the boycott exception should not be applied to combinations that target consumers, they had no difficulty in concluding that a boycott includes "attempts by members of the insurance business to force other members to follow the industry's private rules and practices." 438 U.S. at 565 (Stewart, J., dissenting). Thus, every Member of the Court in *Barry* agreed that the boycott exception applies to "any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them." 91 Cong. Rec. 1480, 1485 (1945) (statement of Sen. O'Mahoney).[14]

[13] Contrary to petitioners' suggestion (H. Br. 27-29), *Barry* did not hold or suggest that a Sherman Act boycott is not necessarily a McCarran-Ferguson Act boycott. Rather, the Court observed that not all conduct that violates the "prohibitions" of the Sherman Act (including price-fixing) is a boycott. 438 U.S. at 545 n.18.

[14] Senator O'Mahoney explained:

> The vice in the insurance industry * * * was * * * that there was in the industry a system of private government which had been built up by a small group of insurance companies * * *. These private groups sought, by the imposition of penalties, by writing rules and regulations, and by holding secret trials * * * to enforce * * * regulations for the insurance business which they wrote themselves in their wholly private and exclusive associations. * * * [T]his conference report represents a tremendous gain because it outlaws completely all steps by which small groups have attempted to establish themselves in control of the * * * business of insurance.

91 Cong. Rec. 1480, 1485 (1945).

2. a. Contrary to petitioners' contentions (H. Br. 37-43), respondents' complaints do not allege mere "agreement[s] to fix rates and terms of coverage." 438 U.S. at 553. Petitioners' alleged agreements were not limited to rates and terms of insurance that the parties to the agreement proposed to offer. Rather, petitioners allegedly agreed to force insurance companies that were *not* parties to the agreements to accept terms that those companies did not wish to adopt by denying them access to reinsurance except on those terms. In other words, Hartford and its allies allegedly conspired to prevent Hartford's competitors from offering the type of insurance that Hartford did not want to offer. Petitioners' general references to "agreements on terms and conditions" simply ignore this important difference. Similarly, petitioners' assertion (H. Br. 40) that the reinsurers made a unilateral decision not to reinsure the 1984 forms ignores respondents' allegations that the reinsurers were enlisted by Hartford and other primary insurers as part of a conspiracy to coerce recalcitrant primary insurers to abandon the broader types of CGL coverage.

b. Petitioners' alleged conduct falls squarely within the exception to McCarran-Ferguson immunity for "boycott, coercion, or intimidation." By enlisting reinsurers to withhold reinsurance from competing primary insurers, Hartford pressured its competitors and the ISO into capitulating and adopting the more restrictive terms that Hartford demanded. The Hartford petitioners thus "enlist[ed] * * * third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group." *Barry*, 438 U.S. at 544-545. In addition, peti-

tioners' alleged activity was an "attempt[] by members of the insurance business to force other members to follow the industry's private rules and practices." *Id.* at 565 (Stewart, J., dissenting). See *In re Workers' Compensation Insurance Antitrust Litigation*, 867 F.2d 1552, 1560-1567 (8th Cir.) (boycott exception applies to enforcement of agreement by excluding non-cooperating insurers from association, membership in which is necessary to participate in market), cert. denied, 492 U.S. 920 (1989); P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 210.2, at 123 (Supp. 1991) ("'A [concerted] refusal to deal except [on specified terms], without more' is exempt," but such a refusal becomes "a nonexempt boycott as soon as the cartel members attempt[] to coerce recalcitrant members.").

As petitioners recognize (H. Br. 35), "the boycott exception is properly construed against the background of *SEUA*." Indeed, the Court's opinion used the critical statutory words—"boycotts together with other types of coercion and intimidation"—to describe SEUA's activity. See SEUA, 322 U.S. at 535. Hartford's use of reinsurance as a weapon to force competing insurers to change their policy terms is tellingly similar to the restrictive practices at issue in *SEUA*. SEUA established insurance rates and enforced them: members agreed to adhere to the rates, and deviations were investigated and punished by fines, with expulsion a final penalty. *Id.* at 535-536; 91 Cong. Rec. 1485-1486 (1945) (statement of Sen. O'Mahoney); *Joint Hearing* at 45-48 (statement of Att'y Gen. Biddle); *id.* at 192-193 (statement of Robert Hyder, Missouri Ass't Att'y Gen.). SEUA's principal enforcement weapon was denial of reinsurance. *SEUA*, 322 U.S. at 535 ("Companies not members of S.E.U.A. were cut off from the opportunity to reinsure their risks."); *Joint Hearing* at 48 (statement of Attorney General Biddle) ("The heavy club used by [*SEUA*] to police their rating agreements and to obtain adherence of competitors to such agreements [was] reinsurance.").

c. The Hartford petitioners contend (H. Br. 29-32, 36-37) that their alleged activities were not a McCarran-Ferguson boycott because the reinsurers stopped short of an absolute refusal to deal on any terms with the targeted primary insurers. That contention is untenable.[15]

First, petitioners ignore the language of the statute, which provides that the federal antitrust laws shall apply not only to boycotts, but also to "any * * * act of * * * coercion[] or intimidation." 15 U.S.C. 1013(b). Acts of "coercion" or "intimidation" plainly include acts intended to compel the target of the boycott to deal on specified terms. Indeed, "coercion" and "intimidation" ordinarily refer to the use of power to compel the victim to do something—*i.e.*, a conditional, rather than an absolute, refusal to deal.[16]

Second, petitioners' contention is inconsistent with the traditional definition of "boycott" under the Sherman Act. An antitrust boycott does not require an absolute refusal by the boycott "enforcer" to deal on any terms. See, *e.g.*, *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209, 213 (1959) (some boycotting manufacturers and distributors continued to deal with target, although not on the same terms as with the target's competitor, who was part of the conspiracy); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600, 608 (1914) (boycotted wholesalers could end retailers' boycott by agreeing not to sell in competition

[15] Petitioners themselves ultimately concede, in a footnote (H. Br. 32 n.14), that an absolute refusal to deal is not a necessary element of a McCarran-Ferguson boycott, but instead is merely "a probative factor."

[16] "Coercion" is the "use of physical or moral force to compel to act or assent"; to "coerce" is "to compel to an act or choice by force, threat, or other pressure." *Webster's Third New International Dictionary* 439 (1986). "Intimidation" is the "act of intimidating"; "intimidate," in turn, means "to compel to action or inaction by threats." *Id.* at 1184.

with retailers); 9 E. Kintner & J. Bauer, *Federal Antitrust Law* § 70.12(B), at 245-246 (1989).

Third, just as in this case, the boycott in *SEUA* was a conditional, rather than an absolute, refusal to deal. The purpose of the boycotts in *SEUA* was not to drive competitors out of business, but rather to "force nonmember insurance companies into the conspiracies." 322 U.S. at 535. The boycotters were willing to reinsure primary insurers provided they joined the organization and followed its rules. See *Joint Hearing* at 335 (statement of Edward Williams, President, Insurance Executives Ass'n) ("[T]he companies that want to come into the Interstate Underwriters Board can come in there. I do not know of any company that is turned down.").

Fourth, petitioners' restrictive interpretation would gut the boycott exception. If the exception were limited to absolute refusals to deal, McCarran-Ferguson would immunize virtually any form of joint coercive activity, so long as the insurers engaging in coercive tactics sought only to "discipline" their competitors rather than to drive them completely out of business through an absolute refusal to deal on any terms. Congress plainly did not intend the boycott exception to have so narrow a scope.

Barry provides no support for the view that a McCarran-Ferguson boycott must involve an unconditional refusal to deal. In *Barry*, the Court considered whether a McCarran-Ferguson boycott includes boycotts targeting *consumers*. Since insurers generally are permitted by the Act to agree on terms and rates offered to consumers, the Court was careful to distinguish the boycott in *Barry* from a simple agreement as to insurance terms and rates. The Court did not hold or suggest that an absolute refusal to deal is a necessary element of a McCarran-Ferguson boycott, particularly one aimed at competitors.[17]

[17] Petitioners contend (H. Br. 29-30) that Congress intended to limit the boycott exception to absolute refusals to deal because such refusals "eliminate[] competition on matters other than terms and conditions of insurance." *Id.* at 29; see *Barry*, 438 U.S. at 553 (boycott "denied policyholders the benefits of competition in vital matters such as claims policy and quality of service."). But the boycott exception is "broad and unqualified," 438 U.S. at 550; there is no "exception to the exception" for boycotts that eliminate competition only on rates and terms. Moreover, a conditional refusal to deal may be used as a device to eliminate competition on matters other than rates and terms.

d. In their brief on the merits, the Hartford petitioners argue (H. Br. 32 n.14, 38-39) for the first time that there is no McCarran-Ferguson boycott if the "enforcer" is willing to deal with both the instigators and their victims on the same terms. That contention, for which petitioners cite no authority, is contrary to the Court's condemnation of the boycott designed to enforce industry-imposed rules against "style piracy" in *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457 (1941). As that seminal decision reflects, a refusal to deal that forces a recalcitrant insurer to conform its practices to private industry rules is no less an act of coercion or intimidation because victims who fall into line are treated the same as the instigators of the boycott. See also *Eastern States*, 234 U.S. at 608. Indeed, the boycotters in *SEUA* did not discriminate against insurance companies who joined the association and followed its rules. By contrast, petitioners' approach would allow insurers to impose "private regulations" free of antitrust constraints, so long as the "enforcers" and their collaborators adhered to their own regulations.

e. Petitioners raise a false alarm by arguing (H. Br. 45-47) that unless their alleged agreements are held to be immune from the antitrust laws, no insurer will able to discuss terms of coverage with its reinsurer. The alleged boycott in this case does not involve discussions between primary insurers and reinsurers concerning the terms on which reinsurance will be available to *those*

primary insurers. It involves discussions about changing the terms available to *competitors* of those primary insurers. There is no reason to believe that Congress viewed such discussions as necessary to the welfare of the insurance industry.[18]

III. PRINCIPLES OF COMITY DO NOT REQUIRE DISMISSAL OF CLAIMS THAT LONDON-BASED FIRMS VIOLATED THE SHERMAN ACT BY AGREEING NOT TO SELL REINSURANCE TO CERTAIN PRIMARY INSURERS IN THE UNITED STATES

The petitioners in No. 91-1128 (the Merrett petitioners) contend that principles of comity require dismissal of three claims (Counts 5, 6, and 8 of the California complaint) alleging that U.K. firms trading in the Lloyd's of London and London Company markets agreed with unnamed co-conspirators to deny reinsurance to primary insurers in the United States until those primary insurers adopted the policy terms demanded by Hartford and its allies.[19] See J.A. 43-46, 47-49. We agree with petitioners that principles of comity may be invoked in antitrust cases, and that the *Timberlane* standard provides a useful formulation of the relevant factors. We believe, however, that the courts below misunderstood the criteria for determining whether there is a conflict between U.S. and foreign law, and therefore found a conflict where

[18] The Hartford petitioners also assert (H. Br. 47-48) that principles of federalism are implicated by finding a boycott in this case, because the States ultimately authorized the forms that Hartford favored. But Congress has determined that no State may authorize a boycott, see pp. 12-13, *supra*; that determination is not open to reconsideration by the courts.

[19] The respondents also allege that the London reinsurers conspired with U.S. primary insurers and reinsurers to deny reinsurance to U.S. primary insurers who declined to alter the terms of CGL insurance. J.A. 37-43. Petitioners do not raise a comity argument as to these claims.

none exists. But even on its own premise, we agree with the court of appeals' conclusion that comity does not bar determination of respondents' claims by a U.S. court.

1. a. Both courts below held that the U.S. courts have subject matter jurisdiction over the disputed claims because the Merrett petitioners' alleged conduct had a "direct, substantial and reasonably foreseeable effect" on commerce within the U.S. or import trade in the U.S. Pet. App. 73a-75a, 27a-28a. That holding is correct.

The jurisdictional reach of the Sherman Act is extremely broad. See *Summit Health, Ltd.* v. *Pinhas*, 111 S. Ct. 1842, 1846 & nn.7-10 (1991). The Act expressly applies to acts "in restraint of trade or commerce * * * with foreign nations." 15 U.S.C. 1, 2. The enactment history indicates that Congress intended the Sherman Act to apply to restraints on import trade. See 21 Cong. Rec. 2456, 2461, 3152 (1890). Although an early decision of this Court suggested that the antitrust laws had no extraterritorial application, see *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 355-357 (1909), that aspect of *American Banana* has been "substantially overruled" by subsequent decisions. *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 407 (1990). See *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 & n.6 (1986); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-705 (1962); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945).

In any event, the FTAIA, 15 U.S.C. 6a, makes it clear that jurisdiction under the Sherman Act extends to restraints of the sort alleged in this case.[20] By its

[20] The FTAIA provides, in part, 15 U.S.C. 6a,:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—

terms, the FTAIA does not apply to direct restraints on import commerce—the kind of restraints alleged here. It does, however, make the Sherman Act applicable to non-import restraints on our foreign commerce that have a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce. 15 U.S.C. 6a(1)(A). The FTAIA's enactment history shows that Congress considered the import trade to be vital and particularly deserving of the Sherman Act's protection. H.R. Rep. No. 686, 97th Cong., 2d Sess. 9-10 (1982). Thus, Congress certainly intended the jurisdictional threshold for import restraint cases to be no higher than the threshold for export restraint cases. See *U.S. Department of Justice Antitrust Enforcement Guidelines for International Operations* 30-31 (1988) (*DOJ Guidelines*). Because the alleged restraints plainly had a "direct, substantial, and reasonably foreseeable effect" on import trade, they are within the jurisdictional reach of the Sherman Act.[21]

b. In our view, a federal court may invoke principles of comity in an antitrust case even though the challenged conduct had a "direct, susbtantial, and reasonably foreseeable effect" on U.S. commerce. To be sure, neither the text nor the legislative history of the Sherman Act men-

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States.

[21] Sturge is the only petitioner that contends that "there is no jurisdiction over the claims against [its predecessor in interest] K.F. Alder." S. Br. 19. Respondents' complaint charges Alder with participating in a boycott of U.S. primary insurers' pollution policies covering U.S.-based claims. J.A. 32, 45-46. As both courts below concluded, the alleged conduct had a direct, substantial, and reasonably foreseeable effect on American commerce. Indeed, Sturge itself states (S. Br. 22) that the pollution coverage involved "astronomical cost."

tions comity. But the doctrine of comity was established (if not well defined) at the time the Sherman Act was passed. See *Hilton* v. *Guyot*, 159 U.S. 113 (1895). It is therefore reasonable to assume that Congress intended principles of comity to apply in appropriate cases involving foreign commerce. Moreover, the legislative history of the FTAIA is explicit on this point. The House Report states: "If a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts' ability to employ notions of comity, *see, e.g., Timberlane Lumber Co.* v. *Bank of America*." H.R. Rep. No. 686, *supra*, at 13.

c. We agree with the Ninth Circuit that the seven factors set out in that court's *Timberlane* test provide a useful framework for analyzing comity issues.[22] Although multi-factor balancing tests have some familiar disadvantages—they are often difficult to apply and may lead to unpredictable results—the Court has recognized the difficulties in "articulat[ing] specific rules to guide th[e] delicate task of adjudicati[ng] comity issues." *Societe Nationale* v. *U.S. District Court*, 482 U.S. 522, 546 (1987). The comity inquiry must accommodate the legitimate interests of foreign nations, in the expectation that they will reciprocate and thus reduce the overall amount of friction in international litigation. *Id.* at 543-544; *id.* at 555 (Blackmun, J., concurring in part and dissenting in part). At the same time, a comity test should reflect the cardinal principle that "courts in the United

[22] The seven *Timberlane* factors are: "[1] the degree of conflict with foreign law or policy, [2] the nationality or allegiance of the parties and the locations or principal places of business of corporations, [3] the extent to which enforcement by either state can be expected to achieve compliance, [4] the relative significance of effects on the United States as compared with those elsewhere, [5] the extent to which there is explicit purpose to harm or affect American commerce, [6] the foreseeability of such effect, and [7] the relative importance to the violations charged of conduct within the United States as compared with conduct abroad." *Timberlane*, 549 F.2d at 614.

States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U.S. at 409.

There is no shortage of legal standards that seek to reconcile these basic principles. In addition to the seven-factor test of *Timberlane*, there is the ten-factor test of *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1297-1298 (3d Cir. 1979), the six-factor test of the *DOJ Guidelines* at 32-33 n.170, and the eight-factor test of Section 403(2) of the Restatement (Third) of the Foreign Relations Law of the United States (1987). The tests overlap to a large degree. Although we continue to endorse the test set out in the *DOJ Guidelines*, we also believe that the seven *Timberlane* factors are a useful formulation of the relevant considerations.[23]

[23] The *DOJ Guidelines* factors and the *Timberlane* factors are substantially the same, with two exceptions: the *DOJ Guidelines* omit *Timberlane*'s consideration of enforcement compliance; and *Timberlane* omits the *DOJ Guidelines'* interest in "the existence of reasonable expectations that would be furthered or defeated by the action." We believe that enforcement compliance is a relevant factor that may properly be taken into account by a court.

We think that the *Mannington* test is flawed by its sixth factor: "Possible effect upon foreign relations if the court exercises jurisdiction and grants relief." *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d at 1297. In our view, this factor invites unwarranted judicial intrusion into the foreign policy domain of the political branches. We also disagree with two of the factors set out in Section 403(2) of the Restatement (Third) of the Foreign Relations Law of the United States: "(e) the importance of the regulation to the international political, legal or economic system [and] (f) the extent to which the regulation is consistent with the traditions of the international system." We believe that both criteria are exceptionally vague, invite inappropriate judicial involvement in foreign affairs, and may inject into comity analysis principles that are inconsistent with U.S. policy.

Finally, contrary to the British government's view (U.K. Br. 16-21), the warmth of our relations with a foreign nation should not be a factor in a judicial comity analysis. Courts are particularly ill-equipped to determine the state of our foreign relations

Our endorsement of *Timberlane* is qualified in one important respect: We believe that courts should not engage in any comity analysis in antitrust actions brought by the United States. "[C]ourts are generally ill equipped to assume the role of balancing the interests of foreign nations with that of our own." *Societe Nationale*, 482 U.S. at 552 (Blackmun, J., concurring in part and dissenting in part). In private antitrust litigation, the comity analysis must be undertaken by the courts if it is to be undertaken at all. But when the Executive Branch has determined that the interests of U.S. law enforcement outweigh any possible detriment to our foreign relations, separation of powers principles, as well as the Judiciary's own recognition of its limitations in matters of foreign affairs, point to the conclusion that an "American court cannot refuse to enforce a law its political branches have already determined is desirable and necessary." *Laker Airways Ltd.* v. *Sabena*, 731 F.2d 909, 949 (D.C. Cir. 1984) (emphasis omitted). See also *United States* v. *Baker Hughes, Inc.*, 731 F. Supp. 3, 6 n.5 (D.D.C. 1990), affirmed on other grounds, 908 F.2d 981 (D.C. Cir. 1990). Cf. *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F.2d 404, 409 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984).

2. In applying the *Timberlane* test in this case, both courts below concluded that application of the U.S. antitrust laws would create a conflict with United Kingdom (U.K.) law. See Pet. App. 29a-30a, 77a-80a. That conclusion rests on a misunderstanding of the type of conflict that is relevant for purposes of comity analysis.

a. A "conflict" for purposes of comity analysis must be "a true conflict between domestic and foreign law." *Societe Nationale*, 482 U.S. at 555 (Blackmun, J., concurring in part and dissenting in part). Where there is no true conflict, there is less reason for a U.S. court to decline to exercise jurisdiction in a case that is other-

with particular countries or governments. Such determinations might embarrass the President or burden the conduct of foreign relations.

wise properly before it. We submit that a conflict for comity purposes exists if (1) a foreign government has directed the defendants to engage in the disputed conduct, or (2) the defendants could not have avoided engaging in the disputed conduct without frustrating clearly articulated policies of the foreign government.[24]

Measured by that standard, there is no conflict with U.K. law in this case. The Merrett petitioners do not contend that U.K. authorities directed them to boycott U.S. insurers for the purpose of coercing them to adopt the type of policies favored by competing primary insurers. Nor is there any indication that the Merrett petitioners would have frustrated clearly articulated policies of the U.K. if they had not engaged in such a boycott. Nor is a conflict shown by the U.K. government's general objection to applying U.S. antitrust laws to the conduct of its subjects in the U.K., even when such conduct substantially and adversely affects U.S. commerce. M. Br. 26-27; U.K. Br. 3-4.

Contrary to petitioners' contentions, the exercise of jurisdiction by U.S. courts in this case does not interfere with British regulation of Lloyd's or of British insurance markets generally. In support of their conflict argument, petitioners cite portions of the States' prayer for injunctive relief as evidence of an intent "to impose on petitioners a program drafted in San Francisco for the underwriting of reinsurance in London." M. Br. 25. That argument is premature. If respondents

[24] Although this Court has never expressly recognized a defense of foreign sovereign compulsion, we believe that it is appropriate to recognize such a defense in certain circumstances in which a foreign government directs conduct violating our antitrust laws. See *DOJ Guidelines* at 33-34. But no such defense should be available if the foreign government merely authorizes conduct violative of our laws, even if failure to engage in the conduct would frustrate clearly articulated policies of the foreign government. In our brief amicus curiae in *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), we argued that the defense of foreign sovereign compulsion should not apply in antitrust suits brought by the United States. See U.S. Br. 23-24.

prevail on the merits, the district court, applying comity principles, may well confine any relief awarded to monetary damages. In any event, the injunctive relief sought relates to all six counts of the complaints in which most of the Merrett petitioners are named as defendants, not just to the three counts that are the subject of this petition.

d. The lack of conflict is dispositive in this case. Neither petitioners nor their amici argue that in the absence of conflict the district court should refrain from exercising jurisdiction. Thus, there is no need for the Court to decide whether, if there were a significant conflict, other comity factors would outweigh it.[25]

In any event, we believe that the court of appeals correctly concluded that, even if there were a conflict, it would be outweighed by other relevant factors supporting the exercise of juirsdiction. Respondents allege that the Merrett petitioners specifically intended to affect U.S. import commerce, that such effects were foreseeable, and that petitioners in fact succeeded in substantially affecting U.S. commerce. See Pet. App. 31a-32a, 81a-82a. These factors weigh heavily in favor of the exercise of jurisdiction by U.S. courts. In addition, all the plaintiffs are located in the United States. Pet. App. 30a, 80a. The lower courts also determined that a judgment for damages could be enforced against petitioners' assets in the U.S., Pet. App. 31a, 81a, and the court of appeals properly noted the ability of U.S. courts to direct injunctive relief at defendants that are wholly owned by U.S. firms. Pet. App. 30a.[26]

[25] In addition, the Court need not address the far-reaching contention of the Government of Canada that U.S. courts may never hear a case involving the conduct of foreigners in their own country, no matter how great the impact on the U.S. economy, if to do so would create a conflict with the law of the foreign country. We strongly disagree with that contention. See *Laker Airways* v. *Sabena*, *supra*.

[26] Petitioners' claim that the court of appeals wrongly "imported" the FTAIA into its comity analysis (M. Br. 19-22) ignores the fact that the court engaged in a traditional *Timberlane* analysis.

2. Finally, contrary to the Merrett petitioners' contention (M. Br. 29-30), there is nothing anomalous in the fact that the U.S. insurance industry has a measure of antitrust immunity under the McCarran-Ferguson Act, while foreign reinsurers not subject to state regulation have no such immunity. In enacting McCarran-Ferguson, Congress relied on state regulation to protect U.S. consumers. There was no reason for Congress to assume that foreign governments, if they chose to regulate at all, would consider the interests of U.S. consumers. Accordingly, Congress left the Sherman Act in full force as to restraints on our import trade in insurance services that are not regulated by the States.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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